Supreme Court, U.S.
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No. 02-

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IN THE

Supreme Court of the United States

RABBI LUZER WEISS,

Petitioner,

v.

COMMACK SELF-SERVICE KOSHER MEATS, INC., d/b/a COMMACK KOSHER, BRIAN YARMEISCH, JEFFREY YARMEISCH, HON. SHELDON SILVER, ABE ALPER, JON GREENFIELD, JACK LEE, RABBI MOSHE PORTNOY, RICHARD SCHWARTZ, AGUDATH HARABONIM OF THE UNITED STATES AND CANADA, AGUDATH ISRAEL OF AMERICA, NATIONAL COUNCIL OF YOUNG ISRAEL, RABBINICAL ALLIANCE OF AMERICA, RABBINICAL COUNCIL OF AMERICA, TORAH UMESORAH-NATIONAL SOCIETY OF HEBREW DAY SCHOOLS and UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do New York Agriculture and Market Law §§ 26-a, 201-a, 201-b(1), 201-c, 201-e(2-a) and (3-c), 201-f, and 201-h, which punish vendors who, with the intent to defraud, falsely represent food products as "kosher" or prepared in accordance with the "orthodox Hebrew religious requirements," require vendors to label meat or poultry sold as kosher as "soaked and salted" or "not soaked or salted," as the case may be, and create an advisory board for the administration and enforcement of kosher fraud statutes, violate the Establishment Clause on their face?

2. Must a party challenging a statute as unconstitutional on its face establish that no set of circumstances exist under which that statute would be valid?

PARTIES TO THE PROCEEDING

Rabbi Luzer Weiss, the Director of the Kosher Law Enforcement Division of the New York State Department of Agriculture and Markets, was the defendant(-appellant) below and is the petitioner in this Court. Commack Self-Service Kosher Meats, Inc., Brian Yarmeisch and Jeffrey Yarmeisch (hereinafter "Commack") were the plaintiffs(-appellees) in the courts below and are respondents in this Court. Sheldon Silver, Abe Alper, Jon Greenfield, Jack Lee, Rabbi Moshe Portnoy, Richard Schwartz, Agudath Harabonim of the United States and Canada, Agudath Israel of America, National Council of Young Israel, Rabbinical Alliance of America, Rabbinical Council of America, Torah Umesorah-National Society of Hebrew Day Schools and Union of Orthodox Jewish Congregations of America were intervenors (-appellants) in the court below and are respondents in this Court.

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OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, reported at 294 F.3d 415 (2d Cir. 2002), is set forth in Appendix A. The opinion of the District Court for the Eastern District of New York, reported at 106 F. Supp. 2d 445 (E.D.N.Y. 2000), is set forth in Appendix B. The order of the United States Court of Appeals for the Second Circuit denying the petition for rehearing is set forth in Appendix C.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on May 21, 2002, and the Court of Appeals denied the petition for rehearing on August 1, 2002.

STATUTES INVOLVED

The statutes involved in this case are N.Y. Agric. & Mkts. Law §§ 26-a, 201-a, 201-b(1), 201-c, 201-e(2-a) and (3-c), 201-f, and 201-h. The pertinent text of these statutes is set forth in Appendix D.

STATEMENT OF THE CASE

A. Introduction

This case concerns a facial challenge under the Establishment Clause to New York statutes that prevent or punish fraud in the sale of kosher food products, and thereby protect consumers throughout New York State who purchase products labeled as kosher. The challenged statutes punish

vendors who, with the intent to defraud, falsely represent food products as "kosher" or as prepared in accordance with the "orthodox Hebrew religious requirements," *see* N.Y. Agric. & Mkts. Law §§ 201-a(1), 201-b(1), 201-c, 201-e(3-c), 201-f, 201-h, and require vendors to label meat or poultry sold as kosher as "soaked and salted" or "not soaked and salted," as the case may be, *see id.* §§ 201-a(2), 201-e(2-a). Also challenged is the statute that creates an advisory board to enhance the administration and enforcement of New York's kosher fraud statutes. *See id.* § 26-a.

These statutes are the progeny of the first kosher fraud statute enacted in the United States. In April 1915, the New York Legislature amended a general mislabeling statute to add a new provision that declared a person guilty of a misdemeanor when that person, with intent to defraud,

> [s]ells or exposes for sale any meat or meat preparation and falsely represents the same to be kosher, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word "kosher" in any language.

1915 N.Y. Laws 233, § 1. As the New York courts held, "[t]he purpose of th[is] statute, manifestly, is to prevent and punish fraud in the sale of meats or meat preparation." *People v. Atlas*, 183 A.D. 595, 596 (1st Dept. 1918), *aff'd mem.*, 230 N.Y. 629 (1921).

This provision, as amended in 1922, was upheld by this Court. In rejecting a void-for-vagueness challenge under the Due Process Clause of the Fourteenth Amendment, this Court concluded that, in general, vendors could distinguish between food that is and food that is not "kosher" or in accordance with the "orthodox Hebrew religious requirements": "[T]he term 'kosher' has a meaning well enough defined to enable one engaged in the trade to correctly apply it, at least as a general thing." *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 502 (1925).

More than eighty-five years later, however, the Second Circuit held that the challenged statutes are facially invalid under the Establishment Clause. *See Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415 (2d Cir. 2002). The court below primarily reasoned that the State, when determining whether food products are "kosher" or prepared in accordance with the "orthodox Hebrew religious requirements," or whether meat or poultry sold as kosher has been "soaked and salted," must necessarily interpret religious doctrine or rely on religious authorities, and resolve any religious disputes in favor of Orthodox Judaism. *See id.* at 425-31. The Second Circuit also concluded that the challenged statutes, on their face, amount to a government endorsement of Orthodox Judaism. *See id.* at 426-27. Finally, the Second Circuit found that N.Y. Agric. & Mkts. Law § 26-a, which creates the Advisory Board on Kosher Law Enforcement to advise state officials on the administration and enforcement of the kosher fraud statutes, violates the Establishment Clause on its face by delegating authority to the Board on the basis of religion. *See id.* at 429.

This petition presents the following reasons why certiorari is warranted here: *First*, the decision below directly conflicts with this Court's ruling in *Hygrade*, this Court's precedent as to the appropriate standard for adjudicating facial challenges, and this Court's precedent under the Religion Clauses of the First Amendment. *Second*, the decision below substantially implicates important constitutional issues by casting serious constitutional doubt upon the laws of nineteen other States with kosher fraud statutes that are substantially similar to New York's kosher fraud statutes. *Third*, this case presents an opportunity to clarify the appropriate general standard for adjudicating facial constitutional challenges.

B. Procedural History

In January 1996, Commack filed this action under 42 U.S.C. § 1983 in the District Court of the Eastern District of New York, alleging, among other things, that N.Y. Agric. & Mkts. Law §§ 201-a, 201-b(1), 201-c, 201-e(2-a) and (3-c), 201-f, 201-h, and 26-a violate the Establishment Clause.

The district court permitted intervention by several individuals and organizations, *see Commack Self-Service Kosher Meats, Inc. v. Rubin*, 170 F.R.D. 93, 106-07 (E.D.N.Y. 1996), and refused to abstain pursuant to *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), *see Commack Self-Service Kosher Meats v. Rubin*, 986 F. Supp. 153 (E.D.N.Y. 1997). On subsequent cross-motions for summary judgment, the district court denied defendant's and intervenors' motion, and granted Commack's motion on the ground that, on their face, the challenged statutes violate the Establishment Clause. *See Commack Self-Service Kosher Meats, Inc. v. Rubin*, 106 F. Supp. 2d 445 (E.D.N.Y. 2000).

By Order entered October 4, 2000, the district court stayed its judgment pending appeal except insofar as that judgment affects Commack.

On May 21, 2002, the Second Circuit affirmed, concluding that the challenged statutes excessively entangle government and religion and otherwise have the primary effect of advancing and inhibiting religion. *See Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415 (2d Cir. 2002). Although the Second Circuit acknowledged petitioner's argument that "because this is a facial attack, we should apply the rule of *United States v. Salerno*, 481 U.S. 739, 745 [] (1987), requiring the plaintiff to show that 'no set of circumstances exists under which the [statute] would be valid,'" the Second Circuit stated that it need not address this argument "because we conclude for the reasons given that . . . the laws fail the test of constitutionality even using the assumptions that are most accommodating to the State". *Id.* at 425 n.7.

The Second Circuit opined that the challenged statutes excessively entangle government and religion for three reasons. *First*, "because the challenged laws interpret 'kosher' as synonymous with the views of . . . Orthodox Judaism, the State has effectively aligned itself with one side of an internal debate within Judaism." *Id.* at 426.

Second, "to assert that a food article does not conform to kosher requirements, New York must take an official position as to what are the kosher requirements. In doing so, the [State] must either interpret religious doctrine or defer to the interpretations of religious officials in reaching its official position." *Id.* at 427.

Third, the Second Circuit found that N.Y. Agric. & Mkts. Law § 26-a, which establishes the Advisory Board on Kosher Law Enforcement, delegated authority to the Board "on the basis of religion," because (1) the Board's purpose is "to advise the [State] regarding the requirements of Orthodox Jewish dietary laws;" and (2) "of the six rabbis on the Board, all are Orthodox." *Id.* at 429. Although the Second Circuit recognized that "section 26-a does not require that Board members be rabbis or even Orthodox Jews," it found that fact to be "insignificant," because the challenged statutes' " 'adoption of the Orthodox rules inevitably requires the intimate involvement of members of that faith, and the leaders of that faith, in discerning the applicable standard.' " *Id.* (citation omitted).

The Second Circuit also found that the challenged statutes had (1) the primary effect of advancing religion, by placing the State's "imprimatur on the religious views of [one branch of Judaism] to the exclusion of others," and conferring "a substantial benefit on Orthodox Jews and not on others;" and (2) the primary effect of inhibiting religion, by prohibiting "members of other branches of Judaism from using the kosher label in accordance with the dictates of their religious beliefs where their dietary requirements differ from those of Orthodox Judaism." *Id.* at 430.

The Second Circuit added that "State reliance on religious authorities and the establishment and activities of the Advisory Board" had the primary effect of advancing religion by creating "a 'joint exercise of . . . authority [that] provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred.'" *Id.* at 430-31 (citation omitted) (brackets in original).

Judgment was entered on May 21, 2002. Petition for rehearing was denied on August 1, 2002. On August 28, 2002, the Second Circuit granted petitioner's motion pursuant to Fed. R. App. P. 41(d)(2) to stay issuance of the mandate pending filing and disposition of a petition for writ of certiorari to this Court.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Conflicts With Relevant Decisions of This Court

Certiorari should be granted in this case because the Second Circuit's invalidation of the challenged statutes on their face directly conflicts with this Court's precedent, *i.e.*, (1) this Court's ruling, in a vagueness challenge to predecessors to the challenged statutes, that the term "kosher" has a meaning well enough defined to enable those engaged in the kosher products trade to determine whether food products are kosher; (2) this Court's precedent on the standard for adjudicating facial challenges; (3) this Court's constitutional prohibition on assuming that public officers will act in violation of the Establishment Clause solely because they are also members of the clergy; and (4) this Court's precedent on when a challenged statute amounts to a government endorsement of religion in violation of the Establishment Clause.

A. The Decision Below Conflicts With This Court's Prior Ruling on Predecessors to the Challenged Statutes

By determining that the State must rely on religious authorities to enforce the challenged statutes, and by further concluding that the purpose of the Advisory Board on Kosher Law Enforcement is to provide those religious authorities, the Second Circuit's decision directly conflicts with this Court's ruling in *Hygrade Provision Co. v. Sherman*, 266 U.S. 497 (1925).

In *Hygrade*, food vendors sought to enjoin enforcement of predecessors to the challenged kosher fraud statutes by alleging "the impossibility or, at least, the great difficulty of determining with certainty what is kosher according to the Rabbinical law and the customs, traditions and precedents of the orthodox Hebrew religious requirements." *Hygrade*, 266 U.S. at 499-500. This Court, however, found that the statutory terms "kosher" and "orthodox Hebrew religious requirements" were not void for vagueness, concluding that whatever difficulty there may be in reaching a correct determination as to whether a given product is kosher, "the term 'kosher' has a meaning well enough defined to enable one engaged in the trade to correctly apply it, at least as a general thing." *Id.* at 502.[1]

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1. At that time, New York courts had already construed the term "kosher" and the phrase "orthodox Hebrew religious requirements" as synonymous. *See Atlas*, 183 A.D. at 597 (holding that New York Legislature had intended to use the term "kosher" "evidently in the ordinary sense in which it is used in the trade, which is to designate meat as having been prepared under and of a product sanctioned by said religious requirements").

Hygrade directly conflicts with the main predicate of the Second Circuit's ruling, *i.e.*, that the State must rely upon the religious knowledge of rabbis to distinguish between kosher and non-kosher food. Because this Court in *Hygrade* found that kosher product vendors — persons engaged in the kosher food trade — can generally ascertain whether a product is kosher, it follows that the State need not rely on the religious knowledge of rabbis to distinguish between kosher and non-kosher food. Yet despite petitioner's considerable reliance on *Hygrade* in his papers below, the Second Circuit failed to cite *Hygrade*, let alone explain how its ruling can be reconciled with *Hygrade*.

B. The Decision Below Conflicts With This Court's Precedents Governing Adjudication of Facial Challenges

The Second Circuit's decision also conflicts with this Court's precedent governing adjudication of facial challenges. In Establishment Clause facial challenges, three factors guide the general nature of a court's inquiry: whether the challenged statute "is motivated wholly by an impermissible purpose," has the "primary effect" of advancing religion, or "requires excessive entanglement between church and state." *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988) (citations omitted). In assessing such facial challenges, however, courts cannot invalidate the challenged statute on its face simply because particular applications of that statute may violate the Establishment Clause. *See id.* at 612 (rejecting facial Establishment Clause challenge to federal grant program, and noting that "[i]t has not been the Court's practice, in considering facial challenges to statutes of this kind,

to strike them down in anticipation that particular applications may result in unconstitutional use of funds") (citation & internal quotation marks omitted).[2]

However, petitioner argued below that Commack faced an even more formidable burden because, under this Court's precedent, a party challenging a statute on its face "must establish that no set of circumstances exists under which the [statute] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *accord Anderson v. Edwards*, 514 U.S. 143, 155 n.6 (1995); *Reno v. Flores*, 507 U.S. 292, 301 (1993); *Rust v. Sullivan*, 500 U.S. 173, 183 (1991). Although the Second Circuit acknowledged petitioner's argument that this *Salerno* rule applied here,[3] that court stated that it need not

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2. One caveat is that in an Establishment Clause facial challenge where the statute or policy at issue has no secular purpose, there is no need also to consider the possible applications of that statute or policy. *See Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290, 314 (2000); *Edwards v. Aguillard*, 482 U.S. 578 (1987). This caveat does not apply here, because it is undisputed that the challenged statutes "were enacted for the secular purpose of protecting consumers from fraud in the kosher food market." *Commack*, 294 F.3d at 431. The court below observed that such fraud protection benefits "the general public. Indeed, Jewish consumers reportedly now make up less than thirty percent of the consumers of kosher food. The remainder are Muslims and others with similar religious requirements, persons with special dietary restrictions, and those who simply prefer food bearing the kosher label as a symbol of purity." *Id.* (citation omitted).

3. Although the dissent in *Bowen* asserted that the *Bowen* majority had rejected application of the *Salerno* rule in Establishment Clause cases, *see Bowen*, 487 U.S. at 627 n.1 (Blackmun, J., with whom Brennan, J., Marshall, J., and Stevens, J.,

(Cont'd)

address this argument "because we conclude for the reasons given that . . . the laws fail the test of constitutionality even using the assumptions that are most accommodating to the State." *Commack*, 294 F.3d at 425 n.7. But if the Second Circuit had meant what it said, it would have required Commack to demonstrate that no set of circumstances exists under which the challenged statutes would be valid, because that standard, announced in *Salerno*, is "most accommodating" to the State.

The Second Circuit's reasoning, however, demonstrates that it followed neither *Salerno* nor *Bowen* in making its ruling. The court below emphasized the existence of specific and narrow religious disagreements within Judaism as to the proper observance of the religious dietary practices, and relied on *one* example of enforcement to conclude that the challenged statutes necessarily require the State to interpret religious doctrine. *See id.* at 426-28. This reasoning directly conflicts with both *Bowen* and *Salerno*, for two reasons.

First, as petitioner argued below, enforcement of the challenged statutes does not necessarily require the State to refer to religious views, let alone interpret religious doctrine. The statutory terms "kosher" and "orthodox Hebrew religious requirements" are reasonably construed as terms of art that acknowledge the origins of kosher food in religious dietary

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(Cont'd)
join, dissenting), a more recent dissenting opinion suggests that the *Salerno* rule does apply to Establishment Clause facial challenges. *See Doe*, 530 U.S. at 318 (Rehnquist, C.J., with whom Scalia, J., and Thomas, J., join, dissenting) ("Therefore, the question is not whether the district's policy *may* be applied in violation of the Establishment Clause, but whether it *inevitably* will be.") (second emphasis added).

practice, but incorporate by reference the established trade standards in the kosher food industry for deciding whether a product is properly represented as kosher. Legislatures routinely write statutes using terms of art whose meaning can be established by reference to the custom and practice of the particular trade, business, or industry to which those statutes apply. *See, e.g., O'Hara v. Luckenbach Steamship Co.*, 269 U.S. 364, 370-71 (1926). Here, the State can enforce the challenged statutes by determining whether a product's physical characteristics and its method of preparation conform with established trade standards in the kosher food industry, without regard to particular religious views. In turn, a vendor could show either that established trade standards permit the vendor's representation of a product as kosher or that there is no established trade standard, *i.e.*, no clear indication as to how the kosher food trade would classify that product. Thus, under either *Bowen* or *Salerno*, the challenged statutes are facially constitutional, because the State need not ever interpret religious doctrine to enforce the challenged statutes.

Second, even if a particular application of the challenged statutes could conceivably turn on a point of *religious* disagreement, which in turn would open the door to the interpretation of religious doctrine, the Second Circuit's ruling still conflicts with *Bowen* and *Salerno*, because enforcement of those statutes does not *usually* or *inevitably* require the State to resolve a religious controversy. In the vast majority of cases, there is no religious dispute concerning the characteristics necessary for a food product to qualify as kosher, only a purely factual dispute as to whether the product in question possesses those characteristics. For example, while there may be a factual dispute as to whether a particular product advertised as kosher contains pork, there is no

religious dispute that a product containing pork is not kosher, just as there is no religious dispute that meat is not kosher if it is cooked with milk, no effort has been made to draw out and drain its blood, or it has been mixed with other undisputedly non-kosher meat. In such cases, the State could enforce the challenged statutes without resolving religious disputes, and therefore, without violating the Establishment Clause.[4]

The Second Circuit further demonstrated that it ignored both *Bowen* and *Salerno* by facially invalidating N.Y. Agric. & Mkts. Law § 26-a, which establishes the Advisory Board on Kosher Law Enforcement, in part on the ground that "of the six rabbis on the Board, all are Orthodox." *Commack*, 294 F.3d at 429. Since *Bowen* and *Salerno* both prohibit a finding of facial unconstitutionality based on a single application of a statute, the presence of Orthodox rabbis on the Board at a particular time cannot support facial invalidation of N.Y. Agric. & Mkts. Law § 26-a, because, as even the court below recognized, "section 26-a does not require that Board members be rabbis or even Orthodox Jews." *Id.*

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4. As long as religious views relevant to a secular dispute occasion no doctrinal controversy, a civil court is not constitutionally barred from considering those views to resolve that dispute. *Cf. Jones v. Wolf*, 443 U.S. 595, 605 (1979) (rejecting compulsory deference of civil courts to decision regarding church property dispute by final authoritative tribunal in hierarchical church organization "even where no issue of doctrinal controversy is involved").

C. The Decision Below Conflicts With This Court's Prohibition On Assuming that Public Officers Will Act In Violation of The Establishment Clause Solely Because They Are Also Members of the Clergy

In determining that N.Y. Agric. & Mkts. Law § 26-a delegates government authority on the basis of religion, the Second Circuit assumed that the members of the current Advisory Board on Kosher Law Enforcement who are Orthodox Jewish rabbis would steer the Board as a whole to act in favor of Orthodox Jews and therefore violate the Establishment Clause. By resting on this assumption, the decision below directly conflicts with *McDaniel v. Paty*, 435 U.S. 618 (1978).

In *McDaniel*, this Court held that a state statute that prohibited clergy from becoming delegates to the state constitutional convention violated the Free Exercise Clause. *See McDaniel*, 435 U.S. at 629 (plurality opinion); *id.* at 630 (Brennan, J., with whom Marshall, J., joins, concurring in the judgment) (reasoning that statute violates both the Free Exercise Clause and the Establishment Clause). Rather than finding a constitutional defect in allowing clergy members to hold public office, this Court invalidated the statute at issue as based on the impermissible assumption that public officers will use their office in an unconstitutional manner based solely on their status as clergy. *See id.* at 629 (plurality opinion) ("[T]he American experience provides no persuasive support for the fear that clergymen in public office will be less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts.") (footnote omitted); *id.* at 641 (Brennan, J., with whom Marshall, J., joins, concurring in the judgment) ("The Establishment Clause does not license government to

treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.") (citation omitted).

Here, the Second Circuit flouted *McDaniel* by assuming exactly that. The court below found that N.Y. Agric. & Mkts. Law § 26-a delegates authority to the Advisory Board on the basis of religion by relying in part on the fact that "of the six rabbis on the Board, all are Orthodox," even while recognizing that "section 26-a does not require that Board members be rabbis or even Orthodox Jews." *Commack*, 294 F.3d at 429. This reasoning rests on the impermissible assumption that the members of the current Board who are Orthodox Jewish rabbis will use their public office to steer the Board as a whole to act in favor of Orthodox Jews, and therefore violate the Establishment Clause, *because* those members are Orthodox Jewish rabbis. That assumption cannot stand after *McDaniel*, which applies with the same force to the Second Circuit as it does to legislatures.

D. The Decision Below Conflicts With This Court's Precedent On When A Challenged Statute Amounts to A Government Endorsement of Religion in Violation of the Establishment Clause

The Second Circuit's ruling also conflicts with this Court's precedent instructing lower courts how to determine whether a statute amounts to a government endorsement of religion. The Establishment Clause prohibits the government from conveying or attempting to convey a message that a particular religious belief or religion generally is favored. *See County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 593-94 (1989). In ascertaining whether such

government endorsement of religion exists, courts must consider the circumstances from the point of view of a reasonable observer aware of the history and context of the challenged statutes, policy, or government action. *See Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000) ("To properly examine this [public school district] policy on its face, we 'must be deemed aware of the history and context of the community and forum.'") (citation omitted); *see also Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (O'Connor, J., concurring in the judgment) ("This [endorsement inquiry] cannot be answered in the abstract, but instead requires courts to examine the history, language, and administration of a particular statute to determine whether it operates as an endorsement of religion.") (citation omitted).[5]

In determining that the challenged statutes endorse Orthodox Judaism, the Second Circuit did not adopt the reasonable observer's viewpoint but instead simply asserted that those statutes require the State to favor the religious teaching of Orthodox Judaism over other branches of Judaism. The only basis for this conclusion appears to be the statutory phrase "orthodox Hebrew religious requirements," which is used in some, but not all, of the challenged statutes.

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5. While almost all the challenged statutes, by using the terms "kosher," "orthodox Hebrew religious requirements," or "soaked and salted," incorporate by reference rules that have an origin in religious practice, that origin alone does not place the challenged statutes in violation of the Establishment Clause. *See Jones v. Butz*, 374 F. Supp. 1284, 1286, 1293 (S.D.N.Y.) (rejecting Establishment Clause challenge to federal statute declaring as humane "'slaughtering in accordance with the ritual requirements of the Jewish faith or any other religious faith that prescribes a method of slaughter whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument'"), *aff'd mem.*, 419 U.S. 806 (1974).

Had the Second Circuit considered this statutory phrase from the viewpoint of a reasonable observer aware of the statutes' history and context, it could not have reached this conclusion. The New York Legislature did not use the adjective "orthodox" in the statutory phrase "orthodox Hebrew religious requirements" as a means of requiring the State to enforce the particular level of religious observance of Jewish dietary practices adhered to by Orthodox Jews. Rather, by the time the Legislature first enacted the kosher fraud statutes, *see* 1915 N.Y. Laws 233, the term "orthodoxy" had already been widely used in reaction to the Reform movement within Judaism to denote observance of the traditional set of Jewish religious customs and practices as a matter of religious obligation. *See* 12 *Encyclopedia Judaica* 1486-87 (1971). Even today, while different Jews may disagree as to the manner and extent to which their religion obliges them to observe the traditional dietary practices, all Jews start with the same traditional set of religious dietary practices — the "orthodox Hebrew religious requirements" — as their common point of reference.[6] The statutory phrase "orthodox Hebrew religious requirements" does nothing more than denote this common point of reference.

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6. The legislative history confirms this interpretation of the phrase "orthodox Hebrew religious requirements." In 1922, the president of the New York branch of the United Synagogue of America, which represented Conservative Jewry in the United States, *see* 5 *id.* at 903, wrote in support of what became the 1922 amendments to the kosher fraud statutes. *See* Letter of A.U. Zinke to Governor Nathan L. Miller, April 10, 1922, *in* Bill Jacket, 1922 N.Y. Laws 581, at 12. Had those provisions required the State to favor Orthodox Judaism over Conservative Judaism, the United Synagogue of America presumably would have opposed the legislation.

The statutory provision that, under certain circumstances, meat or poultry must be washed "by a duly ordained orthodox rabbi" or his authorized representative, does not prove otherwise. N.Y. Agri. & Mkts. Law § 201-f(1)(b). Rather than sever this requirement, the Second Circuit found it "indicative of the many ways in which the challenged laws excessively entangle the State with religion." *Commack*, 294 F.3d at 429. This requirement, however, was enacted in 1982, *see* 1982 N.Y. Laws 95, § 1, over half a century after the Legislature first used the phrase "orthodox Hebrew religious requirements." Nothing in the text or legislative history indicates that in 1982, the Legislature intended the "orthodox rabbi" requirement of section 201-f(1)(b) to change the meaning of the term "orthodox Hebrew religious requirements" that had been in effect since 1915, and no reasonable observer could conclude to the contrary.

II. The Second Circuit's Decision Substantially Implicates Important Constitutional Issues By Casting Serious Doubt Upon The Constitutionality of Kosher Fraud Statutes In Many Other States

Certiorari is also warranted in this case because the decision below substantially implicates important constitutional issues by casting serious doubt upon the constitutionality of kosher fraud statutes in many other states. Where a case concerning a constitutional challenge to a state statute implicates the constitutionality of many similar or identical statutes in other States, this Court has viewed such a circumstance as a significant factor supporting a grant of a petition for a writ of certiorari. *See, e.g.*, *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 385 (2000); *New York v. O'Neil*, 359 U.S. 1, 3 (1959); *McGee v. International Life Insurance Co.*, 355 U.S. 220, 221 (1957).

This is such a case. Nineteen other States have kosher fraud statutes that are substantially similar to New York's kosher fraud statutes. *See* Ariz. Rev. Stat. § 36-942; Ark. Code Ann. § 20-57-401; Cal. Penal Code § 383b; Conn. Gen. Stat. § 53-317; Ga. Code Ann. § 26-2-331; 410 Ill. Comp. Stat. 645/1; Ky. Rev. Stat. Ann. § 367.850; La. Rev. Stat. Ann. § 40:608.2; Mass. Gen. Laws ch. 94, § 156; Mich. Comp. Laws § 750.297e; Minn. Stat. § 31.651; Mo. Rev. Stat. § 196.165; Ohio Rev. Code Ann. § 1329.29; 18 Pa. Cons. Stat. § 4107.1; R.I. Gen. Laws § 21-16-1; Tex. Bus. & Com. Code Ann. §§ 17.821-17.823; Va. Code Ann. § 18.2-236; Wash. Rev. Code § 69.90.020; Wis. Stat. § 97.56. For example, California's kosher fraud statute was "obviously patterned" on New York's statutes, *Erlich v. Municipal Court*, 360 P.2d 334, 335 (Calif. 1961), perhaps in order to take advantage of this Court's decision in *Hygrade*. As a result, the Second Circuit's ruling throws into doubt the constitutional validity of the kosher fraud statutes in these other states. This Court should grant certiorari to clarify their constitutionality.

III. Certiorari In This Case Will Clarify the Appropriate Standard for Adjudicating Facial Challenges

Certiorari is further warranted because this case presents a ripe opportunity for this Court to clarify the appropriate standard for adjudicating facial challenges. The court below purported to apply the standard "most accommodating" to the State, *i.e.*, the rule in *Salerno* that a party challenging a statute on its face must establish that no set of circumstances exists under which the statute would be valid. *Commack*, 294 F.3d at 425 n.7. Three members of this Court, however, have denied the validity of the *Salerno* rule: "To the extent we have consistently articulated a clear standard for facial

challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself . . . ." *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) (opinion of Stevens, J., joined by Souter, J., and Ginsburg, J.); *see also Washington v. Glucksburg*, 521 U.S. 702, 740 (1997) (Stevens, J., concurring in the judgments) ("I do not believe the Court has ever actually applied such a strict standard, even in *Salerno* itself, and the Court does not appear to apply *Salerno* here.") (footnote omitted); *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1174 & n.1 (1996) (memorandum of Stevens, J., respecting the denial of the petition for certiorari) (citing cases for the proposition that "*Salerno*'s rigid and unwise dictum has been properly ignored in subsequent cases even outside the abortion context") (footnote omitted). Those same Justices also characterized as "doubtful" the proposition that "it would be appropriate for federal courts to apply the *Salerno* standard in some cases." *Morales*, 527 U.S. at 55 n.22.[7]

Importantly, Justices Scalia and Thomas expressly disagreed with the *Morales* plurality's view of the *Salerno* rule, *see id.* at 74-81 (Scalia, J, with whom Thomas, J., joins, dissenting), and Justice Breyer appeared to disagree with that view as well, *see id.* at 71 (Breyer, J., concurring in part and concurring the judgment) ("And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance *is* invalid in all its applications.").

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7. The *Morales* plurality's rejection of the *Salerno* rule, though dictum, has been cited by lower courts as additional evidence of the inconsistent application of the *Salerno* rule, *see United States v. Frandsen*, 212 F.3d 1231, 1235 n.3 (11th Cir. 2000), and by parties as a basis for departing from that rule, *see S.D. Meyers, Inc. v. City & County of San Francisco*, 253 F.3d 461, 467-68 (9th Cir. 2001).

Moreover, Chief Justice Rehnquist, along with Justices Scalia and Thomas, has indicated that the *Salerno* rule applies in an Establishment Clause facial challenge. *See Doe*, 530 U.S. at 318 (Rehnquist, C.J., with whom Scalia, J., and Thomas, J., join, dissenting) ("Therefore, the question is not whether the district's policy *may* be applied in violation of the Establishment Clause, but whether it *inevitably* will be.") (second emphasis added).

This Court should grant this petition to confirm or deny the validity of the *Salerno* rule, for two reasons. First, the *Morales* plurality refused to "resolve the viability of *Salerno*'s dictum" in that case only because that case "comes to us from a state — not a federal — court," and therefore was not governed by "prudential notions of standing created by this Court." *Morales*, 527 U.S. at 55 n.22. That supposed obstacle does not exist here, because this case involves a federal court's adjudication of a facial challenge.

Second, although this case concerns the application of the *Salerno* rule in the Establishment Clause context, certiorari is nonetheless warranted in order to clarify the contexts, if any, in which the *Salerno* rule applies. *See Janklow*, 517 U.S. at 1174 n.3 (Scalia, J., with whom Thomas, J., and Rehnquist, C.J., join, dissenting from denial of petition for a writ of certiorari) ("If . . . JUSTICE STEVENS merely means that the *Salerno* rule has *sometimes* 'been ignored,' though it has other times been *applied*, then he makes a good case for granting rather than denying certiorari.")

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED MAY 21, 2002

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2000

(Argued: June 28, 2001 Decided: May 21, 2002
Errata Filed: June 21, 2002)

Docket Nos. 00-9116, 00-9118

COMMACK SELF-SERVICE KOSHER MEATS, INC., d/b/a Commack Kosher, BRIAN YARMEISCH and JEFFREY YARMEISCH,

Plaintiffs-Appellees,

– v. –

RABBI LUZER WEISS, as Director of the Kosher Law Enforcement Division of The New York State Department of Agriculture and Markets,

Defendant-Appellant,

HON. SHELDON SILVER, ABE ALPER, JON GREENFIELD, JACK LEE, RABBI MOSHE PORTNOY, RICHARD SCHWARTZ, AGUDATH HARABONIM OF THE UNITED STATES AND CANADA, AGUDATH ISRAEL OF AMERICA, NATIONAL COUNCIL OF YOUNG ISRAEL, RABBINICAL ALLIANCE OF AMERICA, RABBINICAL

Appendix A

COUNCIL OF AMERICA, TORAH UMESORAH-NATIONAL SOCIETY OF HEBREW DAY SCHOOL AND UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA,

Intervenors-Defendants-Appellants.

Before MINER, LEVAL, and POOLER, *Circuit Judges.*

MINER, *Circuit Judge.*

The word "kosher" has been part of the vernacular for some time as a synonym for correct, genuine, or legitimate. *See 8 Oxford English Dictionary* 753 (1971). Its original meaning, however, lies in the centuries-old Jewish law of *kashrut*, the Hebrew noun from which "kosher" is derived. *Kashrut* encompasses the entire body of rules relating to foods that may be consumed as well as to the preparation of such foods. The Hebrew National company, a well-known purveyor of kosher hot dogs and other kosher food products, has long marketed its goods with the slogan, "[w]e answer to a higher authority."Hebrew National, http://www.hebrewnational.com/. In New York, the principal authority to which it answers is the State's Department of Agriculture and Markets, which is charged with the enforcement of the New York statutes prohibiting intentional fraud in the sale of kosher food. Whether those statutes are violative of the First Amendment command that "[the States] shall make no law respecting an establishment of religion," is the question before us on this appeal.

Appendix A

Defendant-appellant Rabbi Luzer Weiss, Director of the Kosher Law Enforcement Division of the New York State Department of Agriculture and Markets ("the Department"), and intervenors-defendants-appellants[1] appeal from a summary judgment entered in the United States District Court for the Eastern District of New York (Gershon, *J.*) declaring that New York Agriculture & Markets Law sections 201-a, 201-b(1), 201-c, 201-e (2-a) and (3-c), 201-f, 201-h, and 26-a ("the challenged laws") on their face violate the Establishment Clause of the First Amendment, and enjoining the Department from enforcing those provisions. The challenged laws are some of New York's statutory provisions aimed at preventing fraud in the kosher food industry. Plaintiffs-appellees are Commack Self-Service Kosher Meats, Inc., d/b/a Commack Kosher, an entity in Commack, Long Island engaged in the meat business, and its owners, Brian and Jeffrey Yarmeisch (collectively, "the Yarmeisches"). Over the last sixteen years, the Yarmeisches have been cited for violations of New York's kosher fraud laws on at least four occasions.

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1. Intervenors-defendants-appellants are the Honorable Sheldon Silver, Abe Alper, Jon Greenfield, Jack Lee, Rabbi Moshe Portnoy, Richard Schwartz, Agudath Harabonim of the United States and Canada, Agudath Israel of America, National Council of Young Israel, The Rabbinical Alliance of America, The Rabbinical Council of America, Torah Umesorah National Society of Hebrew Day Schools, and The Union of Orthodox Jewish Congregations of America (collectively, "the intervenors").

Appendix A

In January 1996, the Yarmeisches brought this action, claiming that the challenged laws violate the Establishment Clause of the First Amendment by defining "kosher" to mean food that is "prepared in accordance with the orthodox Hebrew religious requirements." *See, e.g.*, N.Y. Agric. & Mkts. Law §§ 201-a(1), 201-b(1) (McKinney 1991). The Yarmeisches also asserted a free exercise claim in which they contended that the challenged laws deprive non-Orthodox Jewish consumers of kosher food products of their First Amendment right to the free exercise of religion. Additionally, the Yarmeisches claimed that the challenged laws are unconstitutionally vague in violation of due process, and that, by reason of their irregular and arbitrary enforcement, they violate due process as applied. Lastly, the Yarmeisches sought to enjoin the Department from disseminating information concerning future violations of the challenged laws until after an alleged offender is prosecuted and found guilty. After both sides moved for summary judgment, the district court granted the Yarmeisches' motion, holding that the challenged laws on their face violate the Establishment Clause. The court found that (1) the challenged laws excessively entangle the state and religion because, in order to be enforced, the laws require the Department to refer to "orthodox Hebrew religious requirements," and (2) the laws have the impermissible effect of advancing Orthodox Judaism by requiring vendors of food products labeled "kosher" to conform to Orthodox kosher standards and thereby cause consumers of such products to purchase only products that are kosher under the Orthodox definition.

For the reasons that follow, we affirm.

Appendix A

BACKGROUND

I. *The Facts*

The Yarmeisches received their first civil citation for transgressing New York's kosher fraud laws[2] following an inspection of their store by the Department on July 10, 1986. The Department's inspector, Max Goldgrab, seized for testing a package of veal spareribs that was labeled "soaked and salted."[3] The Department's analysis revealed that "selected

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2. The New York Agriculture and Markets Law provides both criminal and civil penalties for violations of the kosher fraud law provisions. A violation constitutes a class A misdemeanor unless the food has a retail value in excess of five thousand dollars, in which case the violation is classified as a class E felony. N.Y. Agric. & Mkts. Law § 201-d (McKinney 2001). Section 16(30) confers on the Department, and thus the commissioner, the authority to investigate, inspect, and supervise the sale of meat and meat preparations at establishments that are subject to the kosher law provisions and to make rules and regulations necessary for enforcement of those provisions. *Id.* § 16(30). Section 39 sets forth generally the civil penalties that the Department may impose for violations of any section of the Agriculture and Markets Law, including the kosher fraud provisions. *Id.* § 39. The attorney general is authorized to bring a civil suit to recover any penalties assessed by the commissioner. *Id.* § 44.

3. A detailed explication of the provisions challenged here is contained in Part I of the next section of this opinion. For now, it is sufficient to note that the heart of New York's kosher fraud statutes is the prohibition on the sale of food products falsely represented "to be kosher . . . or as having been prepared under . . . the orthodox Hebrew religious requirements." N.Y. Agric. & Mkts.

(Cont'd)

surface tissues [of the spareribs] do not contain added salt" and thus that Commack Kosher was in violation of New York's kosher fraud laws. In a letter responding to the citation, the Yarmeisches claimed that Commack Kosher "has always soaked and salted all the meats that state that they are soaked and salted. If this does not meet with the Hebrew orthodox religious requirements we need to know what the analysis was and what the standards should be." Despite this assertion, the Yarmeisches did not formally challenge the violation and paid a civil penalty fine in the amount of $600.

The Department inspected Commack Kosher again on January 7, 1987, and found another violation of New York's kosher fraud laws. This time the Department seized "two . . . packages of beef chuck side steaks," each of which was marked "soaked and salted." The Department's "laboratory analysis did not reveal a significantly greater salt content in the outside surface of the steak than in the inside." The Department asserted that "[h]ad the steak been properly soaked and salted[,] . . . the analysis would have indicated that the outside surface of the steak . . . had a measurably higher salt content than the inner part of the meat." The Department therefore concluded that "[t]he defendant's steak was not soaked and salted according to orthodox Hebrew religious requirements and was improperly offered for sale and represented as such." Accordingly, the Department alleged violations of New York Agriculture and Markets Law

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(Cont'd)

Law § 201-a(1). One of these requirements is that, after slaughter, meat must be "koshered," through a procedure in which the meat is soaked and salted to draw out the blood. *See, e.g., Ran-Dav's County Kosher, Inc. v. State of New Jersey*, 129 N.J. 141, 147 (1992).

section 201-a(1), which prohibits the sale of any food product represented to be "kosher" that has not been prepared "in accordance with the orthodox Hebrew religious requirements," as well as section 201-c(1), which contains a similar prohibition. N.Y. Agric. & Mkts. Law §§ 201-a(1), 201-c(1). The Yarmeisches responded to the claimed violations in a letter dated April 29, 1987, which contained the following explanation of their soaking and salting method:

> We take the side steak with the top and bottom fat left on the meat and soak it in water for one half hour, salt for one hour, and then rinse thoroughly. We then proceed to remove the fat and then face the meat (remove dark meat before packaging).
>
> This is the procedure for all meat that is labeled soaked and salted, all of which is done under the direction of Rabbi Berman who has been supervising this establishment for approximately five years.

Rabbi Berman is a rabbi who adheres to the teachings of the Conservative branch of Judaism. The Yarmeisches' letter further explained that they believed their procedures for soaking and salting were in accordance with kosher requirements and requested that the Department "explain how [any problem with their procedures] can be rectified." The Department did not directly respond to their inquiry, but instead filed a verified civil complaint against the Yarmeisches. Ultimately, the Yarmeisches paid a $300 civil penalty fine as punishment for the 1987 violation.

Appendix A

After a third inspection of Commack Kosher in April 1988, the Department quarantined lamb tongues on the ground that the tongues had not been properly soaked and salted. The specific allegation of wrongdoing was that the tongues were found soaking in a solution of salt water, which "is improper preparation [that] render[ed] the tongues irreversibly non kosher". The Yarmeisches challenged the Department's decision, stating that the tongues were properly soaked and salted as certified by their supervising rabbi. The Department countered with a letter to the Yarmeisches claiming that, in any event, the tongues had not been properly deveined in accordance with Orthodox Hebrew requirements. The Yarmeisches state that this charge is still pending, while the Department says that it considers the case closed and, if any charges are still pending, it will have them dismissed.

The Department inspected Commack Kosher again on February 22, 1993. A month later, the Department informed the Yarmeisches that by "offering for sale poultry as kosher without the required markings on labels 'soaked and salted' or 'not soaked and salted,' " the Yarmeisches had violated New York Agriculture and Markets Law section 201-a(2). The Department's letter directed the Yarmeisches to submit payment of a civil penalty in the amount of $11,100 within fifteen days to avoid the initiation of court proceedings against them. The Yarmeisches disputed the Department's allegations and claimed that, at the time of inspection, the poultry at issue had not been offered to the public for sale. The Department eventually withdrew the assessed violation.

Appendix A

II. *Procedural History*

On January 16, 1996, about three years after their last assessed violation, the Yarmeisches brought this action against the Department[4] in the United States District Court for the Eastern District of New York. They amended their complaint on April 15, 1996. The Yarmeisches claimed that by defining "kosher" to mean food that is "prepared in accordance with orthodox Hebrew religious requirements," New York's kosher fraud laws violate the Establishment Clause. The Yarmeisches also brought free exercise and equal protection claims based on the allegation that the challenged laws equate "kosher" with "orthodox Hebrew religious requirements." Additionally, the Yarmeisches claimed that the challenged laws are unconstitutionally vague in violation of due process because they fail to define "orthodox Hebrew religious requirements." Arguing that the challenged laws fail to provide for proper training of state inspectors with respect to koshering, therefore leading to "irregular, arbitrary and capricious . . . inspection of kosher facilities by the Kosher Law Enforcement Division," the Yarmeisches claimed that, as applied, the challenged laws violate their due process rights. Finally, the Yarmeisches sought to enjoin the Department from disseminating information concerning

4. On December 9, 1996, Magistrate Judge E. Thomas Boyle granted the motion of the intervenors for permissive intervention pursuant to Federal Rule of Civil Procedure 24(b)(2), provided that the Hon. Sheldon Silver be limited to intervention in his individual capacity.

future violations of the challenged laws to the public[5] until after an alleged offender is prosecuted and found guilty, because to do otherwise violates due process and causes irreparable harm.

On October 18, 1996, the Department sought by motion to have the district court abstain from resolving the Yarmeisches' claims pursuant to *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). In its motion, the Department, in a contention abandoned on appeal, claimed that the meaning of "kosher" under the challenged laws was an unresolved issue of New York law, and thus that the court should refrain from ruling on the laws' constitutionality. In an opinion and order dated December 15, 1997, the district court denied the motion because "[t]he statutory provisions at issue in this case have been interpreted for decades as equating 'kosher' with 'prepared in accordance with orthodox Hebrew religious requirements.' " *Commack Self-Service Kosher Meats v. Rubin*, 986 F. Supp. 153, 156 (E.D.N.Y. 1997). The court based its finding on numerous decisions of New York courts dating as far back as 1918. *See id.* (citing *People v. Atlas*, 183 A.D. 595, 597 (1st Dep't 1918), *aff'd*, 230 N.Y. 629 (mem.) (1921) (noting that "kosher" in the then-existing kosher fraud laws was used "evidently in the ordinary sense in which it is used in the trade, which is to designate meat as having been prepared under . . . the orthodox Hebrew requirements"), and *State v.*

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5. Such publication is permitted by New York Agriculture & Markets Law section 201 j, which provides that after proper notification to the violator, certain information concerning the violation "shall be available to the public."

Glassman, 109 Misc.2d 1088, 1090, 441 N.Y.S.2d 346, 348 (County Ct. 1981) ("The issue in this case is whether the defendants 'with intent to defraud' represented that their frankfurters and salami were Kosher when in fact [they were not because they were] not prepared in accordance with the Orthodox Hebrew religious requirements.")).

The Yarmeisches moved for preliminary injunctive relief on June 9, 1998. On June 18, 1998, the district court denied the motion, but the parties agreed on the record that the Yarmeisches would be notified of any alleged violations of the challenged laws prior to the release of that information to the public. After the completion of discovery, on March 1, 1999, the intervenors moved for summary judgment on the first six claims in the Yarmeisches' complaint, each of which attacked the challenged laws on their face. The Department moved for summary judgment on all the claims on June 7, 1999. Also on June 7, 1999, the Yarmeisches filed a cross-motion for summary judgment on all claims.

In an opinion and order dated July 28, 2000, the district court granted the Yarmeisches' motion and declared that "N.Y. Agric. & Mkts. Law §§ 201-a, 201-b(1), 201-c, 201-e(2-a) and (3-c), 201-f, 201-h and 26-a, on their face violate the Establishment Clause and are therefore unconstitutional." *Commack Self-Service Kosher Meats, Inc. v. Rubin*, 106 F. Supp. 2d 445, 459 (E.D.N.Y. 2000). The court began its analysis by explaining that New York's kosher fraud laws equate "kosher" with "prepared in accordance with orthodox Hebrew religious requirements," rejecting for a second time the Department's contention that the laws are merely registration statutes that impose no definition of "kosher."

Id. at 452. The court then turned to an evaluation of the challenged laws under the test outlined in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The court held the challenged laws unconstitutional because they create an excessive entanglement between the State and religion and impermissibly advance religion.

In the district court's view, the challenged laws create an excessive entanglement because enforcement of the laws requires reference to religious tenets not contained in the statute. *See Commack Self-Service*, 106 F. Supp. 2d at 454-55, 457. The court did not find an excessive entanglement "simply because [the challenged laws] use a word of religious significance," but rather because "they require the sponsorship, financial support and active involvement of New York State in the daily monitoring of the compliance of vendors of kosher products with a set of religious dietary laws, which are incorporated by reference into the Challenged Laws." *Id.* at 454-55. Moreover, the court explained that "[e]ven where the Challenged Laws describe some specific procedures that must be followed before a product may properly be called kosher, the procedures refer back to orthodox Hebrew religious requirements; for example, meat 'shall be washed in accordance with orthodox Hebrew religious requirements . . . by a duly ordained orthodox rabbi or by a person authorized by him.' N.Y. Agric. & Mkts. § 201-f." *Id.* at 455.

Additionally, the district court held that the challenged laws represent an impermissible state advancement of religion because (1) they require "state officials . . . [to] enforc[e] a set of religious laws," *id.* at 458, and (2) the incorporation of Orthodox kosher standards "creates an impermissible

symbolic union of church and state," *id.* at 459 (internal quotation marks omitted). The district court therefore held that the challenged laws on their face violate the Establishment Clause and, accordingly, did not address the Yarmeisches' other claims. The district court's judgment was entered on July 31, 2000, declaring the challenged laws unconstitutional and permanently enjoining the Department from enforcing them. This appeal followed.

DISCUSSION

I. *New York's Kosher Fraud Statutes*

In 1915, the New York legislature added to a penal statute prohibiting false labeling, a provision that was designed "to prevent and punish fraud in the sale of [kosher] meats or [kosher] meat preparation." *Atlas*, 183 A.D. at 596. New York's kosher fraud statutes presently are contained in Article 17 of the State's Agriculture and Markets Law entitled "Adulteration, Packing, and Branding of Food and Food Products." Article 17 includes a number of provisions relating to various food items. Section 199-a(1) of Article 17 generally prohibits the sale of "any article of food which is adulterated or misbranded." This case involves a constitutional challenge to the provisions of New York's kosher fraud laws that define "kosher" as "prepared in accordance with orthodox Hebrew religious requirements," mandate adherence to those requirements, or are integral to the State's enforcement of such requirements. Those provisions are sections 201-a, 201-b(1), 201-c, 201-e(2-a) and (3-c), 201-f, 201-h, and 26-a.

Appendix A

Section 201-a provides that:

1. A person who, with intent to defraud, sells . . . any . . . article of food . . . and falsely represents the same to be kosher or kosher for Passover . . . or as having been prepared under . . . the orthodox Hebrew religious requirements . . . is guilty of a class A misdemeanor, except that . . . provided said meat or meat preparations in violation has a retail value in excess of five thousand dollars, [a person] is guilty of a class E felony. . . .

2. All fresh meats, meat by-products, meat food products and poultry offered for sale at retail as kosher shall be marked on the label when packaged or by a sign when not packaged, with the words "soaked and salted" or "not soaked and salted" as the case may be. Such words when marked on the label or by a sign shall be in letters at least as large as the letters of the words on the label or sign designating such meat, meat by-products, meat food products and poultry as kosher.

3. Fresh meat, meat by-products, meat food products and poultry shall be defined as meat or poultry that has not been processed, except for salting and soaking.

> 4. Every person who sells or exposes for sale, at wholesale or retail, any kosher meat . . . or poultry shall retain all records with respect to the origin of such kosher meat . . . or poultry. . . .

N.Y. Agric. & Mkts. Law § 201-a.

Section 201-b(1) is identical to section 201-a(1) except that it applies to the sale of food products in hotels and restaurants. Section 201-c, entitled "Fraudulent identification of food and food products," provides that no person shall "[w]ilfully mark . . . as kosher, or as kosher-style, or as having been prepared in accordance with the Hebrew orthodox religious requirements food or food products not kosher or not so prepared." *Id.* § 201-c(1). Section 201-c(2) prohibits the defacement or alteration of labels affixed to food products to indicate that they are "kosher or have been prepared in accordance with the Hebrew orthodox religious requirements." *Id.* § 201-c(2). Section 201-c(3) forbids the sale, possession, or disposal of (1) any food product without its original slaughterhouse label, or (2) any food product to which such label has been fraudulently affixed. *Id.* § 201-c(3).

Section 201-e(2-a) provides that "[i]n the event that non-prepackaged fresh meat or poultry is sold and delivered off-premises as Kosher the meat or poultry and the bill of sale, if any, rendered at the time of delivery shall have affixed to them a label or the printed words 'not soaked and salted' or 'soaked and salted' as the case may be." *Id.* § 201-e(2-a). Section 201-e(3-c) requires slaughterhouses that sell kosher food products to maintain records "regarding the time, place, date, person or organization supervising the slaughter of

[an] animal and the number of animals slaughtered in accordance with orthodox Hebrew religious requirements." *Id.* § 201-e(3 c).

Section 201-f, captioned "Kosher meat or poultry," provides that:

> 1. All meat or poultry which is sold . . . and is represented as having been prepared in accordance with orthodox Hebrew religious requirements and which has not been soaked and salted immediately after slaughter on the premises where slaughtered:
>
> (a) shall have affixed to it a tag or plumba stating the date and time of day . . . of slaughter; and
>
> (b) shall be washed in accordance with orthodox Hebrew religious requirements within seventy-two hours after slaughter, and within each subsequent seventy-two hour period, by a duly ordained orthodox rabbi or by a person authorized by him. . . .
>
> 2. No person shall sell, offer or expose for sale any meat or poultry which is represented as having been prepared in accordance with orthodox Hebrew religious requirements, unless such meat or poultry is in compliance with subdivision one of this section.

3. For purposes of this section:

(a) [defining "meat"]

(b) [exempting liver from 1(b)]

4. All kosher poultry in the form of the whole bird shall be tagged with a plumba identifying it as kosher. Whole birds shall be so tagged at the original slaughterhouse.

5. The commissioner shall promulgate rules and regulations as are necessary to implement the provisions of this section, including but not limited to, the type of kosher identification to be affixed to each of the parts of such meat and poultry.

Id. § 201-f.

Section 201-h prohibits the "label[ing of] food or food products with the words parve or pareve or in any way . . . indicat[ing] that the food or food product may be used or consumed indiscriminately with meat, poultry or dairy products according to Orthodox-Hebrew requirements when such food or food products are impermissible for such use or consumption." *Id.* § 201-h.

Lastly, section 26-a establishes a nine-person advisory board on kosher law enforcement within the Department.

The advisory board's members are appointed by the commissioner of the Department. The advisory board's role under the statute is

> to advise, counsel and confer with the commissioner on matters of policy in connection with the administration and enforcement of [the kosher fraud] laws . . . , to consider all matters submitted to it by the commissioner, and on its own initiative to recommend to the commissioner such changes in the [kosher fraud] laws . . . as may be deemed advisable . . . and, with the consent of the commissioner, to submit for enactment by the legislature such draft or drafts of legislation imposing such further restrictions on the possession, sale and exposure for sale of kosher meats, meat preparations and food products, as may be deemed necessary.

Id. § 26-a(4).

The provisions outlined here are not all of New York's kosher fraud laws, but only those challenged by the Yarmeisches and held unconstitutional by the district court.[6]

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6. For example, there are several provisions that require the identification or registration of the person or organization certifying a food product as kosher, *see, e.g.*, N.Y. Agric. & Mkts. Law §§ 201-g, 201-e(3), and 201-i, as well as several provisions requiring that food products represented as kosher be labeled as such, *see, e.g.*, *id.* §§ 201-e(1) and (2). None of these provisions were challenged by the Yarmeisches and thus are not at issue on this appeal.

II. *The* Lemon *Test*

As the Supreme Court has recently reiterated, in "cases involving facial challenges on Establishment Clause grounds, . . . we assess the constitutionality of an enactment by reference to the three factors first articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)." *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 314 (2000) (internal quotation marks and citations omitted). The *Lemon* factors require that a challenged law (1) have a valid secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not foster excessive state entanglement with religion. 403 U.S. at 612-13. We treat the excessive entanglement prong as a part of our "inquiry into a statute's effect." *Agostini v. Felton*, 521 U.S. 203, 233 (1997). We find the challenged laws do not pass constitutional muster under the *Lemon* test because they have a primary effect that both advances and inhibits religion.[7]

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7. Plaintiffs contend we should judge the constitutionality of these laws under the standard of strict scrutiny, as in *Larson v. Valente*, 456 U.S. 228, 246 (1982), and defendants claim that, because this is a facial attack, we should apply the rule of *United States v. Salerno*, 481 U.S. 739, 745 (1987), requiring the plaintiff to show that "no set of circumstances exists under which the [statute] would be valid." We need not answer either question because we conclude for the reasons given that, as to both questions, the laws fail the test of constitutionality even using the assumptions that are most accommodating to the State.

Appendix A

A. *The Entanglement Factor*

Here the entanglement of the State and religious authorities is extensive and contributes to a primarily religious effect. The Supreme Court has explained that the Framers understood the First Amendment's prohibition on laws "respecting an establishment of religion" to preclude government "sponsorship [of religion], financial support [for religion], [or the] active involvement of the sovereign in religious activity," *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970). Like the Establishment Clause generally, the prohibition on excessive government entanglement with religion "rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948).

It appears to us that the challenged laws excessively entangle government and religion because they (1) take sides in a religious matter, effectively discriminating in favor of the Orthodox Hebrew view of dietary requirements; (2) require the State to take an official position on religious doctrine; and (3) create an impermissible fusion of governmental and religious functions by delegating civic authority to individuals apparently chosen according to religious criteria.

The Department argues that the challenged laws do not excessively entangle the government with religion because "no one disputes the meaning of the term 'kosher.' " There is ample evidence in the record to support the opposite

conclusion. In a guide to observance of Jewish dietary law, published by the United Synagogue Commission on Jewish Education, author Samuel H. Dresner notes that:

> [o]ver the years and in varying locales, rabbinic authorities differed in their interpretations of specific laws [of *kashrut*]. . . . To cite a famous example: Sephardic Jews eat rice and legumes on Passover, Ashkenazic Jews do not. Ashkenazic Jews, by and large, do not eat the hindquarters of beef; Sephardic Jews do.
>
> . . . .
>
> Some of the decisions [regarding the laws of *kashrut*] recorded [in this book] are not accepted by all authorities on Jewish law, notably decisions about wine, cheese, gelatin, swordfish and sturgeon. This is not a novel situation in the history of Jewish law. There have always been disagreements on various points.

Samuel H. Dresner, *The Jewish Dietary Laws* 55-56 (1982).

The New Jersey Supreme Court, in striking down its state's kosher fraud laws as violative of the Establishment Clause, also rejected the State of New Jersey's claim that there is a consensus among the branches of Judaism regarding the proper standards for the preparation and sale of kosher food products: "[T]here is considerable disagreement over what precepts or tenets truly represent the laws of kashrut. There are differences of opinion concerning the application

and interpretation of the laws of kashrut both within Orthodox Judaism and between Orthodox Judaism and other branches of Judaism." *Ran-Dav's County Kosher v. New Jersey*, 129 N.J. 141, 147 (1992) (citing Herman Wouk, *This Is My God* (1959), reprinted in *The Life of Torah* 98-99 (Jacob Neusner ed.1974); Rabbi Hayim Halevy Donin, *To Be a Jew* 102-04, 112-19 (1972); Rabbi J. David Bleich, *Contemporary Halakic Problems* 84-92 (1977)). For example, Orthodox Jews of the Sephardic sect adhere to "glatt" kosher standards that are more stringent than those followed by other Orthodox Jews. Raphael Poliakoff, *What Is Glatt Kosher?*, Kashrus Newsletter, vol. 1, no. 5. As between different branches of Judaism, "Conservative and Orthodox rabbis differ sharply on many . . . issues" such as the kosher status of wine, cheese, sturgeon, and swordfish. Mark A. Berman, *Kosher Fraud Statutes and the Establishment Clause: Are They Kosher?*, 26 Col. J.L. & Soc. Probls. 1, 8 (1992). It is also widely recognized that "the strain between all three denominations [Orthodox, Conservative, and Reform] has increased in recent years." *Id.*

We find it indisputable that there are differences of opinion within Judaism regarding the dietary requirements of *kashrut*. As a result, because the challenged laws interpret "kosher" as synonymous with the views of one branch, those of Orthodox Judaism, the State has effectively aligned itself with one side of an internal debate within Judaism. This it may not do. As the Supreme Court has stated: "Whatever else the Establishment Clause may mean[,] . . . it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed." *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S.

573, 605 (1989). *See also Larson*, 456 U.S. at 244 ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("[Government] may not aid, foster, or promote one religion or religious theory against another."); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (noting that the Establishment Clause prohibits passage of laws that "aid one religion, aid all religions, or prefer one religion over another"). Thus, we find that the challenged laws' preference for the views of one branch of Judaism excessively entangles the State with religion in violation of the Establishment Clause.

The challenged laws also excessively entangle the State with religion because they require New York to adopt an official State position on a point of religious doctrine. The Department argues that this is not so for two reasons. First, the Department claims that the challenged laws "merely incorporate established trade standards that require the State to verify objective physical characteristics of food and whether food has been prepared or handled in certain ways." Second, the Department asserts that the "intent to defraud" requirement of the challenged laws eliminates the possibility that it will need to refer to religious authorities in enforcement proceedings. Because "the Department focuses primarily on ascertaining a vendor's basis for his or her good faith belief that the product being offered for sale is kosher," there is no "need [for the Department] to independently determine whether a product complies with kosher trade standards." We are unpersuaded by these contentions.

Appendix A

In order to assert that a food article does not conform to kosher requirements, New York must take an official position as to what are the kosher requirements. In doing so, the Department must either interpret religious doctrine or defer to the interpretations of religious officials in reaching its official position. The State thus impermissibly "weigh[s] the significance and the meaning of disputed religious doctrine," *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 452 (1969) (Harlan, J., concurring), or "employ[s] religious organizations as an arm of the civil [government] to perform the function of interpreting and applying state standards," *id.* at 451.

To illustrate, in response to their third citation, the Yarmeisches filed a demand for a bill of particulars, requesting that the State set forth in detail certain Orthodox Hebrew religious requirements for kosher food preparation. In order to respond to this demand, State officials corresponded with various Department officials seeking information regarding the proper koshering requirements. For example, a letter sent by Earl S. Roberts, Assistant Attorney General, to Michael McCormick, Assistant Counsel for the Department, requested assistance in responding to the Yarmeisches' demand and instructed McCormick that "[t]he [b]ill [of particulars] should describe briefly each requirement of the kosherizing, i.e. deveining, soaking, salting, and rinsing and identify the code of Jewish Law (Shulhan Aruch) by the tractate and sections which set forth these requirements in full detail."

Appendix A

Another letter, from Aaron Levine, a kosher food inspector with the Department, to Joan A. Kehoe, Counsel for the Department, set forth the relevant sections and chapters of Yoreh Deah, a book of Jewish laws, corresponding to the Yarmeisches' requests for more information regarding the kosher violations alleged against them in the verified complaint. Additionally, there are letters from Rabbi Rubin, an Orthodox rabbi who was then Director of the Division of Kosher Law Enforcement, clarifying various points raised by the Yarmeisches' demand. For example, one letter from Rabbi Rubin to Kehoe explains that "[i]f members of the legal community, whether in Agriculture or the Attorney General's office, want us to trace the origin of (halacha) Jewish law, they should re-phrase their question and ask where in the [16th century] codes of Jewish law is a particular law found," rather than earlier biblical or Talmudic sources.

The draft bill of particulars[8] prepared by New York State in response to the Yarmeisches' request contains the following:

> 1) Veins that contain forbidden blood have to be removed [as] indicated in Section 65, chapter 1 through 5, referred to as laws for removing veins of forbidden blood (Yore Dayah) located in Shulhan Aruch.
>
> 1b) Law of soaking and salting are in Shulhan Aruch (Yore Dayah chapter 1 through 21).
>
> . . . .

8. The record on appeal does not make clear whether a final bill of particulars was delivered.

3a) One blood vein on either side of a tongue has to be removed and the tip of a tongue has to be removed.

The Yarmeisches demand for a bill of particulars merely made more obvious a fact that would have been true even without the demand for a bill of particulars. The State authorities could not make a determination that the Yarmeisches' meat did not conform to kosher requirements without first having arrived at an official position on what the kosher requirements are. To do so excessively entangles the State with religion. *See Presbyterian Church*, 393 U.S. at 451-52.

We also find that the challenged laws fail the excessive entanglement inquiry because they run afoul of "the core rationale underlying the Establishment Clause[, which] is preventing 'a fusion of governmental and religious functions.' " *Larkin*, 459 U.S. at 126 (quoting *School District of Abington Township v. Schempp*, 374 U.S. 203, 222 (1963)). This prohibition is violated not only by the requirement that the State adopt an official position on a matter of religious doctrine, but also by the existence and activities of the Advisory Board.

Section 26-a of the Agriculture and Markets Law establishes an "advisory board on kosher law enforcement" that is required by statute "to advise, counsel and confer" with the Department commissioner on "matters of policy in connection with the administration and enforcement" of the kosher fraud laws, "and on its own initiative to recommend to the commissioner such changes in the [kosher fraud] laws

or rules[,] . . . and with the consent of the commissioner, to submit for enactment by the legislature such . . . legislation . . . as may be deemed necessary." N.Y. Agric. & Mkts. Law § 26-a(4).

The Department argues that the existence and activities of the Advisory Board do not conflict with the Establishment Clause because there is "a complete absence of any Board involvement in enforcement activities." The Board is granted extremely broad powers "to advise, counsel, and confer" with the Department commissioner on policy matters related to enforcement issues and even to draft and submit proposed legislation. We therefore do not find to be wholly accurate the Department's contention that there is a "complete absence" of Board involvement with enforcement of the challenged laws. Although members of the Board do not directly participate in enforcement activities such as the actual inspection of kosher food establishments, issuance of citations, or pursuit of court action against alleged violators, we decline to take such a narrow view of the Board's involvement with enforcement of the challenged laws. To conclude otherwise, would be to exalt form over substance in light of the broad powers granted to the Board that substantially affect enforcement of the challenged laws.

While we acknowledge that "some limited and incidental entanglement between church and state authority is inevitable in a complex modern society," *Larkin*, 459 U.S. at 123, "[w]here 'fusion' [of governmental and religious authority] is an issue, the difference lies in the distinction between a government's purposeful delegation on the basis of religion and a delegation on principles neutral to religion, to individuals

whose religious identities are incidental to their receipt of civic authority." *Grumet*, 512 U.S. at 699. In our case, the Board's purpose — to advise the Department regarding the requirements of Orthodox Jewish dietary laws — and the fact that, of the six rabbis on the Board, all are Orthodox, convince us that New York's delegation of authority to the Board was made on the basis of religion and not "on principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority." *Id.* at 699.

We find it insignificant that section 26-a does not require that Board members be rabbis or even Orthodox Jews. Instead, we agree with the Fourth Circuit that

> even if membership [o]n the [Advisory Board] were not restricted to adherents of Orthodox Judaism, or even if there were no [Advisory Board] at all, [the laws'] adoption of the Orthodox rules inevitably requires the intimate involvement of members of that faith, and the leaders of that faith, in discerning the applicable standard.

Barghout v. Bureau of Kosher Meat & Food Control, 66 F.3d 1337, 1343-44 (4th Cir. 1995). By creating a regime in which there is a combined exercise of civic and religious authority, the challenged laws violate the fundamental principle underlying the Establishment Clause, which is "to prevent, as far as possible, the intrusion of either [government or religion] into the precincts of the other." *Lemon*, 403 U.S. at 614.

We also note that one provision of the challenged laws, section 201-f(1)(b), represents an extraordinary entanglement of government and religion. Section 201-f requires that meat represented as "having been prepared in accordance with orthodox Hebrew religious requirements," but not immediately soaked and salted after slaughtering, must be properly washed "by a duly ordained *orthodox* rabbi or by a person authorized by him." N.Y. Agric. & Mkts. Law § 201-f (emphasis added). That provision, therefore, compels a kosher food vendor to employ a rabbi of a particular branch of Judaism in certain circumstances. The Department conceded at oral argument on this appeal that this provision cannot withstand constitutional attack, but contends that we should sever this requirement from the remaining provisions, which are themselves constitutional. We decline to do so because we find this particular provision indicative of the many ways in which the challenged laws excessively entangle the State with religion.

For all these reasons, we find that the challenged laws excessively entangle the State of New York and religion, and therefore run afoul of the Establishment Clause.

B. *The Advancement of Religion Factor*

We also find that the challenged laws fail the second prong of the *Lemon* test, which mandates that, to avoid conflict with the Establishment Clause, a principal or primary effect of a challenged law must neither advance nor inhibit religion. 403 U.S. at 612. The challenged laws violate this prohibition because they (1) have a primary effect that both advances religion, by preferring the dietary restrictions of

Orthodox Judaism over those of other branches, and inhibits religion, by effectively prohibiting other branches from using the kosher label in accordance with their religious beliefs, and (2) create an impermissible joint exercise of religious and civic authority that advances religion. We reach this conclusion for reasons similar to those that demonstrate excessive entanglement of government and religion.

First, as discussed above, the challenged laws discriminate in favor of the Orthodox view regarding the dietary requirements of *kashrut*. Through these laws, the State has selected the views of one branch of Judaism, thereby placing its imprimatur on the religious views of the one to the exclusion of others. Moreover, the use of the State's enforcement authority to prevent labeling of food products that do not meet Orthodox Hebrew religious requirements as kosher confers a substantial benefit on Orthodox Jews and not on others. We find that this constitutes an impermissible advancement of religion in violation of the Establishment Clause.

The challenged laws are significantly different in both kind and degree from those laws the Supreme Court has held merely have an "indirect, remote, or incidental benefit upon religion," *Lynch*, 465 U.S. at 683 (internal punctuation omitted), and therefore do not advance religion. For example, in *Lynch*, the Court held that the inclusion of a creche within a Christmas holiday display comprised of many figures and decorations traditionally associated with Christmas did not confer a substantial and impermissible benefit on religion in general or on Christianity in particular because its "reason or effect merely happens to coincide or harmonize with the tenets of some . . . religions." *Id.* at 682 (quoting *McGowan*

v. Maryland, 366 U.S. 420, 442 (1961)). The Court reached the same conclusion regarding legislative prayers in *Marsh v. Chambers*, 463 U.S. 783, 792 (1983), and Sunday closing laws in *McGowan*, 366 U.S. 420. None of the governmental actions challenged in those cases, however, involved the preference by government of one interpretation of sacred text over others.

Moreover, unlike the governmental actions at issue in the above-cited cases, the kosher fraud laws also inhibit religion. This is so because, by defining "kosher" as synonymous with the views of only Orthodox Judaism, the State prohibits members of other branches of Judaism from using the kosher label in accordance with the dictates of their religious beliefs where their dietary requirements differ from those of Orthodox Judaism. As a result, kosher food vendors can only comply with the law, and thus avoid the risk of civil and criminal sanctions, when they accept a meaning of kosher as defined by religious views that are not their own. We find this to be an impermissible inhibition of religion.

Second, the fusion of governmental and religious authority discussed in relation to the excessive entanglement inquiry — State reliance on religious authorities and the establishment and activities of the Advisory Board — creates a "joint exercise of . . . authority [that] provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." *Larkin*, 459 U.S. at 125-26. The Supreme Court has held that even the mere appearance of such joint exercise "can be seen as having a 'primary' and 'principle' effect of advancing religion." *Id.* at 126. Here, the challenged laws, as described earlier, produce an *actual*

joint exercise of governmental and religious authority. United exercises of authority of this kind are prohibited by the Establishment Clause because of the danger that the government's action will be "perceived by [some] as an endorsement of their religious choices, or by [others] as a disapproval of their own." *Grumet*, 512 U.S. at 695 (internal quotation marks omitted). Thus, by defining kosher according to the Orthodox view, the challenged laws "symbolically plac[e] the government's official seal of approval on one religious view." *Marsh*, 463 U.S. at 792 (internal quotation marks omitted).

For these reasons, we find that New York's kosher fraud laws at issue in this case both impermissibly advance and impermissibly inhibit religion in violation of the Establishment Clause.

C. *The Secular Purpose Factor*

Finally, because the secular purpose prong of the *Lemon* test is often easily satisfied, and is uncontested by the parties here, we address it last. This prong rarely presents the greatest obstacle for laws attacked on Establishment Clause grounds because governmental action will only be found to lack a secular purpose where "there [is] no question that the statute or activity was motivated wholly by religious considerations." *Lynch*, 465 U.S. at 680. The parties here do not dispute that the challenged laws were enacted for the secular purpose of protecting consumers from fraud in the kosher food market.

Appendix A

We agree with the New Jersey Supreme Court that a state has "a valid interest in preventing fraud in the sale of any foods, including kosher foods." *Ran-Dav's*, 129 N.J. at 167. This interest in protecting against fraud in the kosher food market extends to the general public. Indeed, Jewish consumers reportedly now make up less than thirty percent of the consumers of kosher food. *See* Frank Bruni, *The Brave New World of Kosher; Foods Exert a Growing Appeal That Isn't Just for Jews*, N.Y. Times, Nov. 15, 1996, at B1. The remainder are Muslims and others with similar religious requirements, persons with special dietary restrictions, and those who simply prefer food bearing the kosher label as a symbol of purity. The State clearly has a valid secular interest in protecting from fraud all those who choose to consume kosher food products. We do note, however, that the challenged laws imperfectly accomplish this secular purpose because their avowed purpose is amply covered by the existing general fraud laws. *Cf. Larkin*, 459 U.S. at 124 ("[T]hese valid secular objectives can be readily accomplished by other means."). For example, section 199-a(1) prohibits any misbranding of food, and therefore would penalize vendors who falsely represented their products to be kosher according to the standard described on the label. In other words, under the general statutory scheme governing fraud in the food industry, the State "can prevent fraud in the sale of kosher food in a less restrictive and neutral manner by simply requiring that any vendor engaged in the sale of kosher food state the basis on which the food is labeled kosher." *Barghout*, 66 F.3d at 1346 n.15. Thus, the valid secular purpose articulated by the State can be accomplished by nondiscriminatory means that do not advance religion.

In sum, we find the New York kosher fraud laws challenged here unconstitutional on their face. Even assuming the challenged laws were enacted for a valid secular purpose, they violate the Establishment Clause by fostering excessive State entanglement with religion and by producing a primary effect that both advances and inhibits religion. Because we find the challenged laws unconstitutional on their face, we need not address the Yarmeisches' remaining arguments.

CONCLUSION

In accordance with the foregoing, the judgment of the district court is affirmed.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED AND FILED JULY 28, 2000

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

96 CV 179

COMMACK SELF-SERVICE KOSHER MEATS, INC., d/b/a COMMACK KOSHER, BRIAN YARMEISCH and JEFFREY YARMEISCH,

Plaintiffs,

v.

RABBI SCHULEM RUBIN, as Director of the Kosher Law Enforcement Division of THE NEW YORK STATE DEPARTMENT OF AGRICULTURE AND MARKETS,

Defendant,

and

HON. SHELDON SILVER, THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, ABE ALPER, JON GREENFIELD, JACK LEE, RABBI MOSHE PORTNOY, RICHARD SCHWARTZ, AGUDATH HARABONIM OF THE UNITED STATES AND CANADA, AGUDATH ISRAEL OF AMERICA, NATIONAL COUNCIL OF YOUNG ISRAEL, RABBINICAL ALLIANCE OF AMERICA, RABBINICAL COUNCIL

Appendix B

OF AMERICA, TORAH UMESORAH NATIONAL SOCIETY OF HEBREW DAY SCHOOLS, UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA,

Defendants-Intervenors.

Decided: July 28, 2000

Filed: July 28, 2000

OPINION AND ORDER

GERSHON, United States District Judge:

Plaintiffs, Long Island merchants servicing consumers of kosher food products, challenge the constitutionality, under both the United States and New York State Constitutions, of certain of the New York State laws aimed at protecting consumers of food products labeled "kosher" from fraud. The named defendant is the Director of the Kosher Law Enforcement Division of the New York State Department of Agriculture and Markets (the "Department").[1] In December 1996, several Orthodox Jewish organizations, a rabbi, a competitor of plaintiffs, and individual consumers of kosher products were permitted to intervene jointly as defendants pursuant to Federal Rule of Civil Procedure 24(b)(2). Discovery has been completed.

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1. Rabbi Rubin has since been replaced by Rabbi Luzer Weiss as Director of the Kosher Law Enforcement Division.

Appendix B

Plaintiffs claim that the statutes described below (the "Challenged Laws") violate both the Establishment and Free Exercise Clauses of the First Amendment, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Defendant and the intervenors seek summary judgment dismissing the first six counts of the complaint, which challenge the laws on their face. Plaintiffs seek summary judgment on all claims, including count seven, which challenges the laws as applied.

The Challenged Laws

Section 201-a(1) of the New York Agriculture and Markets Law provides that:

> 1. A person who, with intent to defraud, sells . . . any . . . article of food . . . and falsely represents the same to be kosher or kosher for Passover, whether such . . . article of food . . . be raw or prepared for human consumption, or as having been prepared under, and of a product or products sanctioned by, the orthodox Hebrew religious requirements, either by direct statement orally, or in writing, which might reasonably be calculated to deceive or lead a reasonable man to believe that a representation is being made that such food is kosher or prepared in accordance with the orthodox Hebrew religious requirements . . . is guilty of a class A misdemeanor, except that . . . provided said meat or meat preparation in violation has a retail value in excess of five thousand dollars, [a person] is guilty of a class E felony. . . .

> 2. All fresh meats, meat by-products, meat food products and poultry offered for sale at retail as kosher shall be marked on the label when packaged or by a sign when not packaged, with the words "soaked and salted" or "not soaked and salted" as the case may be. Such words when marked on the label or by a sign shall be in letters at least as large as the letters of the words on the label or sign designating such meat, meat by-products, meat food products and poultry as kosher.
>
> 3. Fresh meat, meat by-products, meat food products and poultry shall be defined as meat or poultry that has not been processed, except for salting and soaking.
>
> 4. Every person who sells or exposes for sale, at wholesale or retail, any kosher meat . . . or poultry shall retail all records with respect to the origin of such kosher meat . . . or poultry. . . .

Section 201-b(1) parallels the provisions of Section 201-a except that it applies specifically to the sale of food products in hotels and restaurants. Section 201-c, entitled "Fraudulent identification of food and food products," provides that no person shall "[w]ilfully mark . . . as kosher, or as kosher-style, or as having been prepared in accordance with the Hebrew orthodox religious requirements food or food products not kosher or not so prepared. . . . "

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Section 201-e(2-a) provides that "[i]n the event that non-prepackaged fresh meat or poultry is sold and delivered off-premises as Kosher the meat or poultry and the bill of sale, if any, rendered at the time of delivery shall have affixed to them a label or the printed words 'not soaked and salted' or 'soaked and salted' as the case may be," and Section 201-e(3-c) provides that "[a]ny person or firm owning or operating a slaughterhouse which produce meat or poultry which is offered as kosher in this state shall keep records with respect thereto, subject to inspection by the department, regarding the time, place, date, person or organization supervising the slaughter of the animal and the number of animals slaughtered in accordance with orthodox Hebrew religious requirements. . . . "

Section 201-f, which bears the caption "Kosher meat or poultry," provides that:

> 1. All meat or poultry which is sold . . . and is represented as having been prepared in accordance with orthodox Hebrew religious requirements and which has not been soaked and salted immediately after slaughter on the premises where slaughtered:
>
> (a) shall have affixed to it a tag or plumba stating the date and time of day . . . of slaughter; and
>
> (b) shall be washed in accordance with orthodox Hebrew religious requirements within seventy-two hours after slaughter, and within each subsequent

> seventy-two hour period, by a duly ordained orthodox rabbi or by a person authorized by him. . . .

2. No person shall sell, offer, or expose for sale any meat or poultry which is represented as having been prepared in accordance with orthodox Hebrew religious requirements, unless such meat or poultry is in compliance with subdivision one of this section.

3. For purposes of this section:

(a) [defining "meat"]

(b) [exempting liver from 1(b)]

4. All kosher poultry in the form of the whole bird shall be tagged with a plumba identifying it as kosher. Whole birds shall be so tagged at the original slaughterhouse.

5. The commissioner shall promulgate rules and regulations as are necessary to implement the provisions of this section, including but not limited to, the type of kosher identification to be affixed to each of the parts of such meat and poultry.

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Section 201-h provides that "[i]t shall be unlawful to label food or food products with the words parve or pareve or in any way to indicate that the food or food product may be used or consumed indiscriminately with meat, poultry or dairy products according to Orthodox-Hebrew requirements when such food or food products are impermissible for such use or consumption."

Finally, Section 26-a establishes a nine-person advisory board appointed by the Commissioner of the Department of Agriculture and Markets to counsel the Commissioner on policy matters, to confer and discuss regulations regarding the preparation of kosher foods, and to propose amendments to the Kosher Laws for adoption by the legislature. The statute provides as follows:

> It shall be the duty of the advisory board hereby established to advise, counsel and confer with the commissioner on matters of policy in connection with the administration and enforcement of laws and rules relating to kosher meats, meat preparations, and food products, to consider all matters submitted to it by the commissioner, and on its own initiative to recommend to the commissioner such changes in the laws or rules relating to the possession, sale and exposure for sale of kosher meats, meat preparations, and food products, as may be deemed advisable to secure the effective administration and enforcement of such laws and rules and, with the consent of the commissioner, to submit for enactment by the legislature such draft or drafts of legislation imposing such further restrictions on the

> possession, sale and exposure for sale of kosher meats, meat preparations and food products, as may be deemed necessary.

N.Y. Agric. & Mkts. Law § 26-a(4).[2]

The Challenged Laws are contained in a separate section of New York's laws regarding adulteration and mislabeling of food products and are additional to N.Y. Agric. & Mkts. § 201, entitled "Misbranding of food," which provides that "food shall be deemed to be misbranded . . . if its labeling is false or misleading in any particular."

Section 201-d provides that violations of the Challenged Laws shall be a class A misdemeanor, except that a person who with intent to defraud sells meat with a retail value of more than five thousand dollars, that is falsely represented to be kosher, is guilty of a class E felony.

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2. Although plaintiffs sometimes refer to the laws they challenge as N.Y. Agric. & Mkts. Law §§ 201-a *et seq.*, the amended complaint, briefs and oral argument indicate that they are challenging on their face only the laws identified in the text, namely, those laws which, as described *infra* at pp. 9-11, define kosher as prepared in accordance with orthodox Hebrew religious requirements, require adherence to those requirements, or are integral to the State's enforcement of such requirements. Plaintiffs include within their challenge the statutes referring to meat or poultry being "soaked and salted," a term which is not defined in the statutes and refers to religious requirements of food preparation. That is, plaintiffs do not challenge those laws which merely require the identification or registration of the person or organization certifying a food product as kosher, *see, e.g.*, N.Y. Agric. & Mkts. Law § 201-g and § 201-e(3), or N.Y. Agric. & Mkts. Law § 201-i, which authorizes certifying persons to file with the department a statement of the person's qualifications.

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Background

Except as otherwise indicated, the following facts are undisputed.

Plaintiffs Brian and Jeffrey Yarmeisch are butchers in Commack, Long Island. Plaintiffs, along with Evelyn Yarmeisch, run a butcher shop known as Commack Self-Service Kosher Meats, Inc., also known as Commack Kosher, which is itself named as a plaintiff. Plaintiffs describe themselves as "Jewish," but "not observant in accordance with the tenets of Orthodox Judaism." Plaintiffs also state that their butcher shop, Commack Kosher, has "at the times relevant hereto" had "kosher supervision . . . under the auspices of a duly ordained rabbi of the Jewish faith."

Plaintiffs have received citations from the New York State Department of Agriculture and Markets for numerous violations of the Kosher Laws. The most recent offense is alleged to have occurred in February 1993, when Inspector P. Schnell cited plaintiffs for attempting to sell as kosher poultry that did not bear the proper labeling. Plaintiffs disputed the report and claimed that, at the time of the inspection, the poultry at issue had not been offered to the public for sale. Plaintiffs further asserted that eighteen of the nineteen packages referred to in Inspector Schnell's report had not been removed from the boxes in which they were originally delivered and that each box contained a label indicating that the poultry "was kosher in accordance with the supervisory standards of the Union of Orthodox Congregations." The assessed violation was eventually withdrawn by the Department.

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Plaintiffs received similar citations in July 1986, January 1987 and April 1988. In July 1986, plaintiffs were cited for failing to "soak and salt" veal spare ribs. Plaintiffs were sent a notice of violation, stating that the Department had found a package of veal spare ribs which were not "soaked and salted as mandated by Hebrew orthodox religious requirements." Plaintiffs informed the Department that its "store has always soaked and salted all the meats that state that they are soaked and salted." Plaintiffs wrote to the Department that "if this does not meet with the Hebrew orthodox religious requirements, we need to know what the analysis was and what the standards should be." However, they opted not to challenge the violation and paid a fine. The following year, plaintiffs were again cited for possession of an unsalted product — side steaks. Plaintiffs were notified that they were in violation of law for failure to salt the side steaks "as mandated by Hebrew orthodox religious requirements." Plaintiffs sent the Department a letter dated April 29, 1987, stating that they were processing the meat in a manner satisfactory to their supervising rabbi and requesting direction from the State as to the State's interpretation of proper koshering procedures. The Department did not respond to plaintiffs' request but instead issued a complaint against plaintiffs, stating that plaintiffs had failed to kosher their meat "in accordance with orthodox Hebrew religious requirements." The Department found that "Defendant [Commack Kosher] presented to the consumer public that only kosher food, prepared in accordance with orthodox Hebrew religious requirements, was sold on its premises." Plaintiffs deny that they ever made any representation that they sold food koshered "in accordance with orthodox Hebrew requirements," but rather simply represented that

their food products were "kosher." Plaintiffs state that they resolved this dispute by agreeing to pay a fine. Defendant does not contradict plaintiff's evidence, but states that the Department has no records of the 1986 and 1987 citations.

In April 1988, the Department quarantined lamb tongues which it found within the plaintiffs' establishment, on the ground that the tongues had not been properly soaked and salted. Plaintiffs challenged the Department's decision, stating that the tongues were properly soaked and salted as certified by their supervising rabbi. The Department countered in a letter to the plaintiffs stating that, in any case, the tongues had not been properly deveined. Plaintiffs state that this charge is still pending, while defendant says that it considers the case closed and, if any charges are still pending, it will have them dismissed.

Plaintiffs' Claims

Plaintiffs claim that the Challenged Laws define food that is "kosher" as food that is "prepared in accordance with orthodox Hebrew religious requirements" and in so doing they violate the Establishment Clause of the First Amendment of the United States Constitution. Plaintiffs also claim that equating "kosher" with "orthodox Hebrew religious requirements" deprives Jewish consumers who do not follow Orthodox Judaism of their First Amendment right to the free exercise of religion and of their Fourteenth Amendment right to the equal protection of the laws. Plaintiffs further claim that the Challenged Laws are unconstitutionally vague in violation of due process because they fail to define "orthodox Hebrew religious requirements." Arguing that the Challenged

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Laws fail to provide for proper training of state inspectors with respect to koshering, therefore leading to "irregular, arbitrary and capricious . . . inspection of kosher facilities by the Kosher Law Enforcement Division," plaintiffs' claim that, as applied, the Challenged Laws violate their due process rights. Finally, plaintiffs seek to enjoin the Department from disseminating information concerning future violations of the Kosher Laws to the public under Section 201-j of the Kosher Laws, until after the alleged offender is found to be guilty, because, given the alleged arbitrary and uninformed manner in which the Challenged Laws are enforced, to do otherwise would violate the plaintiffs' due process rights and irreparably damage them.

In addition to the above-described facts as to the prosecution of plaintiffs under the Challenged Laws, the parties have submitted voluminous factual material on a variety of subjects, including the way in which the Department enforces the statute; the meaning of the word kosher and the degree of agreement by consumers of kosher food products as to its meaning; and the activities of the statutorily-created Kosher Law Advisory Board. As will be seen, there are no genuine issues of material fact which prevent the court from resolving plaintiffs' facial challenge: Since the New York state courts have authoritatively interpreted the Challenged Laws, the Department cannot avoid an Establishment Clause challenge by claiming that it currently enforces the statute otherwise; on the Department's and the intervenors' own views on the issue of the meaning of the word kosher and its understanding among consumers, a violation of the Establishment Clause is present; and plaintiffs have established their right to relief, without considering their claims of improprieties by the Kosher Law Advisory Board.

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Procedural History

Plaintiffs filed their complaint on January 16, 1996, and their amended complaint on April 15, 1996. On December 9, 1996, Magistrate Judge E. Thomas Boyle granted the intervenors' motion for permissive intervention pursuant to Fed.R.Civ.P. 24(b)(2), provided that the Hon. Sheldon Silver, Speaker of the State Assembly, be limited to intervention in his individual capacity. 170 F.R.D. 93. Plaintiff's application for a preliminary injunction was denied on the record on June 18, 1998, but agreement was reached on the record that plaintiff would be notified by defendant of any alleged violations of law prior to the release of that information for publication.

By my order of December 15, 1997, defendant's motion for abstention under the doctrine of *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941), was denied. 986 F. Supp. 153. In that ruling, the history of the interpretation of the word "kosher" in New York's Kosher Laws was described as follows:

> The statutory provisions at issue in this case have been interpreted for decades as equating "kosher" with "prepared in accordance with orthodox Hebrew religious requirements." As early as 1918, in *People v. Atlas*, 183 A.D. 595, 170 N.Y.S. 834 (1st Dept. 1918), *aff'd without opinion*, 230 N.Y. 629, 130 N.E. 921 (1921), the New York Appellate Division, interpreting provisions of a predecessor statute that are substantially similar to those now challenged by plaintiffs, concluded that the

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> Kosher Laws define "kosher" as "prepared in accordance with orthodox. Hebrew religious requirements. . . . " *Id.* at 183 A.D. 595, 170 N.Y.S. 834.

Later cases, interpreting successor statutes containing the same basic provisions as those interpreted in *Atlas*, have likewise treated the Kosher Laws as defining "kosher" to be "prepared in accordance with orthodox Hebrew religious requirements." *See, e.g., People v. Gordon*, 258 A.D. 421, 16 N.Y.S.2d 833, (2d Dept. 1940), *aff'd without opinion*, 283 N.Y. 705, 28 N.E.2d 717 (1940); *State v. Glassman*, 109 Misc.2d 1088, 441 N.Y.S.2d 346 (N.Y. Co. Ct. 1981) ("The issue in this case is whether the defendants 'with intent to defraud' represented that their frankfurters and salami were Kosher when in fact [they were not because they were] not prepared in accordance with the Orthodox Hebrew religious requirements."); *People v. Johnson Kosher Meat Products, Inc.*, 42 Misc.2d 534, 248 N.Y.S 2d 429, 429 (N.Y. City Civ. Ct. 1964) ("Upon failure at the trial to adduce any evidence that the meat sold as kosher was not prepared wholly in accordance with Hebrew orthodox religious requirements, the charges of fraudulent misrepresentation under Section 201-a were dismissed.")

This settled interpretation of the New York Kosher Laws has also been recognized by the courts of other states. *See, e.g., Erlich v. Municipal Court of the Beverly Hills Judicial District*, 55 Cal. 2d 553, 557-58, 11 Cal. Rptr. 758, 360 P.2d 334 (Cal. 1961) (addressing California statute with "substantially the language of the New York [Kosher Laws]," and giving that statute "the same construction as that given to the New York statutes by the courts of New York," namely, that

"kosher" means " 'having been prepared under . . . the orthodox Hebrew religious requirements' "). And, in an amicus brief submitted to the Supreme Court of New Jersey in *Ran-Dav's County Kosher, Inc. v. State*, 129 N.J. 141, 608 A.2d 1353 (1992), *cert. denied*, 507 U.S. 952 (1993), a recent case holding the New Jersey Kosher regulations unconstitutional on grounds similar to those pressed here, the former Attorney General of the State of New York stated that the New York Kosher Laws "define kosher in terms of orthodox Jewish requirements." Brief of Amicus Curiae Robert Abrams, Attorney General of the State of New York at 16, Exh. F. to Memorandum of Defendant-Intervenors.

The opinion went on to note that:

> Defendant now disavows this interpretation of the Kosher Laws and urges that the statute "does not impose a definition of the ter[m] 'kosher' " and thus avoids plaintiffs' constitutional challenges. Ignoring the body of law interpreting the statutory provisions of which plaintiffs complain, defendant argues that, rather than defining "kosher," those provisions merely require that merchants representing their products as either "kosher" or "in accordance with orthodox Hebrew religious requirements" provide sufficient information to allow a consumer to determine for himself or herself whether the entity or individual supervising the preparation of the products in question applies standards that are consistent with the consumer's individual religious beliefs.

986 F. Supp. at 156-157.

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In the following language, I rejected defendant's argument that the Kosher Laws are essentially registration statutes, requiring only the provision of background information to consumers and imposing no definition of what is and is not kosher:

The fundamental flaw in defendant's argument is that the statutory provisions on which he relies are additional to, and do not replace, the provisions here challenged, which have been interpreted by the state courts as equating "kosher" with "prepared in accordance with orthodox Hebrew religious requirements." *See* N.Y. Agric. & Mkts. §§ 201-a, 201-b, 201-c. Simply put, it is not reasonable to conclude that there is any likelihood that the state courts will treat these additional legislative requirements as fundamentally transforming the Kosher Laws into mere registration statutes. This is so, even if it is presumed that the state courts would if possible construe the Kosher Laws to avoid the constitutional question presented. *See Baggett v. Bullitt*, 377 U.S. 360 (1964).

986 F. Supp. at 157.

ESTABLISHMENT CLAUSE

The Establishment Clause of the First Amendment to the United States Constitution, which applies to state governments through the Fourteenth Amendment, *Everson v. Board of Ed. of Ewing Tp.*, 330 U.S. 1, 8 (1947), provides that "Congress shall make no law respecting an establishment of religion. . . . "

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On a facial challenge to a statute, the challenger must establish that no set of circumstances exists under which the statute would be constitutional. *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Deshawn E. v. Safir*, 156 F.3d 340, 347 (2d Cir. 1998). "Statutes are presumed constitutional," *Bush v. Vera*, 517 U.S. 952, 992 (1996), and "should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature." *Salinas v. United States*, 522 U.S. 52, 59-60 (1997).

Nonetheless, as on the abstention motion, "defendant asks this court to ignore the established interpretation of the statute by the state courts for the very reason that it raises constitutional questions." 986 F.Supp. at 157. This the court cannot do. As stated in *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), "[the state court's] construction of the [statute] is a ruling on a question of state law that is as binding on us as though the precise words had been written into the [statute]." Thus, kosher under the Challenged Laws means prepared "in accordance with orthodox Hebrew religious requirements."

Defendant claims that, despite the authoritative construction of the statutes by the New York courts, the Department of Agriculture and Markets no longer interprets the word "kosher" to mean "in accordance with orthodox Hebrew religious requirements." Rather, defendant argues that the Challenged Laws speak in the disjunctive, in that they refer to products represented as "kosher" or as prepared "in accordance with orthodox Hebrew religious requirements." Defendant "recognizes that there is not a uniform consensus

regarding what constitutes Kosher, and it is for this reason, among others, that defendant does not enforce the Law according to any particular religious standard."[3] *See* Defendant's Response to Plaintiff's Statement Pursuant to Local Rule 56.1 ¶ 9.

Whatever his purpose, defendant cannot now, when confronted with claims that the Challenged Laws violate the Establishment Clause, renounce authoritative judicial interpretations of these laws and claim that a federal court should defer to the Department's claimed new interpretation.[4]

Moreover, defendant does not deny that the Challenged Laws require the State to enforce some level of religious standards. While arguing that "the Department does not

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3. Given my conclusion that this claim is legally insufficient, I do not address the evidence offered by plaintiff disputing defendant's contentions as to his enforcement.

4. Defendant's reliance on the doctrine of federal judicial deference to a federal agency's interpretation of federal law is also unavailing. The issue is not whether there has been a legislative delegation of authority to the New York State Department of Agriculture and Markets to interpret the Challenged Laws. *Cf. Chevron U.S.A., Inc. v. National Resources Defense Council, Inc., et al.*, 467 U.S. 837 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. . . . In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency"). Here, the state courts have explicitly and continuously construed the word "kosher" in the Challenged Laws to mean products "prepared in accordance with orthodox Hebrew religious requirements."

impose religiously-based substantive standards on merchants" (Def. Reply Mem. at 7), defendant acknowledges that "[w]ithout *some* reference to religious doctrine, the State could never be able to assess whether such disclosures were being made in good faith," and that "[i]f . . . the State may permissibly enact laws to prevent kosher fraud, the State must be allowed to refer to substantive Jewish law in implementing such measures." (Def. Reply Mem. at 13.) (emphasis in original).

In *Hygrade Provision Co., Inc. et al. v. Sherman*, 266 U.S. 497 (1925), the Supreme Court rejected a void for vagueness challenge to the New York kosher laws on the ground that they required that vendors represent as kosher only what they believe in good faith to be kosher noting that "the evidence, while conflicting, warrants the conclusion that the term 'kosher' has a meaning well enough defined to enable one engaged in the trade to correctly apply it, at least as a general thing." *Hygrade*, 266 U.S. at 501-502. The kosher laws in *Hygrade* were not challenged under the Establishment Clause.

I turn then to whether the Challenged Laws, as authoritatively construed by the New York courts, violate the Establishment Clause. The three-pronged *Lemon* test remains the starting point in facial challenges under the Establishment Clause, as the Supreme Court recently reiterated in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). *Lemon* requires a challenged law (1) to have a secular purpose, (2) to have a primary effect that neither advances nor inhibits religion, and (3) not to foster excessive state entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Under the first prong of the *Lemon* test,

state action is invalid only if the statute or activity was "motivated wholly by religious considerations." *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984). The Challenged Laws were enacted at least in part to protect consumers of kosher products from fraud. *See Commack*, 986 F. Supp. at 154 (citing *Hygrade*, 266 U.S. at 501) ("The purpose of the statute manifestly, is to prevent and punish fraud. . . . ") (quoting *People v. Atlas*, 183 A.D. 595, 596-97, 170 N.Y.S. 834 (1st Dept. 1918), *aff'd without opinion*, 230 N.Y. 629 (1921)). Thus, the first prong of *Lemon* is satisfied.

In two recent cases in which the issues presented here were comprehensively addressed, the kosher fraud laws of the State of New Jersey and of Baltimore, Maryland were invalidated under the Establishment Clause as violating both the effect and excessive entanglement prongs of *Lemon*. *Ran-Dav's County Kosher Inc. v. State*, 129 N.J. 141, 608 A.2d 1353 (1992), *cert. denied*, 507 U.S. 952 (1993); *Barghout v. Bureau of Kosher Meat and Food Control*, 66 F.3d 1337 (4th Cir. 1995). *But see National Foods, Inc. v. Rubin*, 727 F. Supp. 104, 109 (S.D.N.Y. 1989), where the court, noting that plaintiff was "not challenging the constitutional validity of New York's kosher labeling laws," rejected an Establishment Clause challenge to the laws, as applied to plaintiff, on the ground that no "theological dispute" was claimed.

The New Jersey kosher fraud regulations at issue in *Ran-Dav's* provided that it was "an unlawful consumer practice" to sell or attempt to sell food "which is falsely represented to be Kosher," with kosher defined as "prepared and maintained in strict compliance with the laws and

customs of the Orthodox Jewish religion." *Ran-Dav's*, 129 N.J. at 149. The New Jersey Supreme Court held the regulations unconstitutional under the Establishment Clause as creating an excessive entanglement between religion and the State and having the effect of advancing religion. Regarding the use of the word "kosher" in the regulations, the court concluded that "there is considerable disagreement over what precepts or tenets truly represent the laws of *kashrut* [kosher]," and that "there are differences of opinion concerning the application and interpretation of the laws of *kashrut* both within Orthodox Judaism and between Orthodox Judaism and other branches of Judaism." *Id.* at 147. The court found, however, that even if no such disagreement were present, the kosher fraud regulations still created excessive entanglement by involving the State in the enforcement of religious law not described in secular terms in the regulations. The court recognized that, although "civil courts may resolve controversies involving religious groups if resolution can be achieved by reference to neutral principles of law, . . . they may not resolve such controversies if resolution requires interpretation of religious doctrine," *id.*, and that "the State's adoption and enforcement of the substantive standards of the laws of *kashrut* is precisely what makes the regulations religious, and is fatal to its scheme." *Id.* at 155. Finally, the court concluded that, although "the regulations may have been designed to assure truth in marketing . . . the truths being marketed are, in essence, religious truths." *Id.* at 167.

In *Barghout*, the Court of Appeals for the Fourth Circuit struck down a Baltimore municipal ordinance making it a misdemeanor to, with intent to defraud, offer for sale any

products labeled kosher, or indicating compliance "with the orthodox Hebrew religious rules and requirements and/or dietary laws," when the products did not in fact comply with those laws. The ordinance further stated that:

In order to comply with the provisions of this section persons dealing with either kosher meat, meat preparations, food and/or food products only, or persons dealing with both kosher and non-kosher meat, meat preparations, food and/or food products must adhere to and abide by the orthodox Hebrew religious rules and regulations and the dietary laws; otherwise he shall be in violation of this section.

Id. The Fourth Circuit struck the ordinance as violative of the Establishment Clause, saying, "we think it clear that [the ordinance] is on its face unconstitutional in that it fosters excessive entanglement of religious and secular authority by vesting significant investigative, interpretive, and enforcement power in a group of individuals based on their membership in a specific religious sect," 66 F.3d at 1342, and that its primary effect was the "advancement and endorsement of the Jewish faith, and in particular the Orthodox Jewish faith."[5] 66 F.3d at 1346.

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5. In a concurring opinion, Judge Wilkins agreed with Judge Lay, who wrote the opinion for the Court, that the entanglement and effect prongs of *Lemon* were violated and also agreed, with Judge Luttig in *his* concurring opinion, that the ordinance violated *Larson v. Valente*, 456 U.S. 228 (1982), because it constituted an improper denominational preference.

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The New York laws challenged here provide that any person who, with intent to defraud, falsely represents food or food products as kosher, which, as discussed above, means "prepared in accordance with Orthodox Hebrew religious requirements," may be cited for criminal penalties. The Challenged Laws further provide for the Commissioner of the Department of Agriculture and Markets to appoint a nine-person "advisory board on kosher law enforcement" (referred to here as the Kosher Law Advisory Board). As will be seen, these laws, like those addressed by New Jersey Supreme Court and the Court of Appeals for the Fourth Circuit, violate both the excessive entanglement and effects prongs of *Lemon*.

The prohibition on excessive entanglements derives from an interpretation of the First Amendment as resting "upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *People of Illinois ex rel. McCollum v. Board of Ed.*, 333 U.S. 203, 212 (1948). As the Supreme Court has elaborated, "some limited and incidental entanglement between church and state authority is inevitable in a complex modern society, . . . but the concept of a 'wall' of separation is a useful signpost." *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123 (1982). "The core rationale underlying the Establishment Clause is preventing 'a fusion of governmental and religious functions.' " *Id.* at 126. Indeed, "the Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions." *Id.* at 127. Thus, "a state may not delegate its civic authority to a group chosen according to a religious criterion." *Board of Ed. of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994).

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"In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' " *Lemon*, 403 U.S. at 612 (quoting *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970)). The Challenged Laws violate all three prohibitions in that they require the sponsorship, financial support and active involvement of New York State in the daily monitoring of the compliance of vendors of kosher products with a set of religious dietary laws, which are incorporated by reference into the Challenged Laws. As defendant acknowledges, they necessarily require state officials to refer to and rely upon religious doctrines.

Defendant and the intervenors claim, however, that, under the Challenged Laws, the State enforces only "basic" rules of kosher food preparation, agreed upon by all consumers and vendors of kosher products, which do not involve the interpretation of any religious doctrine and therefore do not require the State to resort to religious authority. This argument is belied by the language of the Challenged Laws and their interpretation by the state courts. In the Challenged Laws, "kosher" means only prepared "in accordance with orthodox Hebrew religious requirements." Even where the Challenged Laws describe some specific procedures that must be followed before a product may properly be called kosher, the procedures refer back to orthodox Hebrew religious requirements; for example, meat "shall be washed in accordance with orthodox Hebrew religious requirements . . . by a duly ordained orthodox rabbi or by a person authorized by him." N.Y. Agric. & Mkts. § 201-f.

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The intervenors' argument that the Challenged Laws merely require vendors to conform their products to general consumer expectations does not eliminate the problem of excessive entanglement. The consumer expectations to which the intervenors are referring are expectations of the vendors' compliance with certain interpretations of religious law, outside of the language of the statutes. Even if the intervenors' argument that there is a consensus amongst Jews on the majority of issues as to what constitutes kosher were established,[6] that would not change the fact that, as stated in *Ran-Dav's*, "the laws of *kashrut* are intrinsically religious, whether they are ambiguous or not and whether they are disputed or not. Religious doctrines cannot be recast as secular principles simply because they are clear. Nor do religious doctrines become neutral simply because they are widely or even universally held." *Id.* at 161 (citations omitted). As the New Jersey Supreme Court said of the regulations at issue in *Ran-Dav's*, 129 N.J. at 155, "the State itself takes on the traditional religious supervisory role, thereby partially supplanting the Jewish organizations and institutions that historically have stood as final judges of religious matters."

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6. Defendant acknowledges the existence of some differences among various groups as to the meaning of kosher. The intervenors do as well, but they argue that any differences are peripheral and resolvable under the "good faith" defense. *See infra*, at p. 20. Plaintiffs for their part have established that defendant did not accept as a defense a statement that their meat was prepared to the satisfaction of "a rabbi of the Jewish faith" who provided kosher supervision to them.

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The intervenors' attempts to analogize the Challenged Laws to prohibitions on selling a product marked "approved by the Vatican," if the product has not been so approved, or against advertising that a crucifix is made out of fourteen carat gold if it is not, are not persuasive; in fact, the purported analogies highlight the flaws in the Challenged Laws. The intervenors' examples would require the State simply to enforce a prohibition against vendors from engaging in garden-variety secular fraud: in the first instance, from claiming that a particular authority has endorsed their product if it has not, and in the second instance, from claiming that a product is made of a certain material if it is not. Unlike here, there would be no need for the State to rely on any religious doctrine to determine compliance with State law. Indeed, the intervenors' examples of permissible regulation more closely resemble the unchallenged disclosure statutes referred to in footnote 2.

Nor does the availability of an implied "good faith" defense to an alleged violation, arising out of the Challenged Laws' requirement of an intent to defraud, *see Hygrade*, 266 U.S. at 501-02, save them from an Establishment Clause challenge. The intervenors and defendant claim that, if a vendor asserted that it believed in good faith that its products were kosher, even if they were not, the vendor would not be prosecuted. An identical argument was rejected in *Barghout* in the following language: "Whether prosecution under the ordinance focuses on the subjective intent of the vendor, or on the vendor's compliance with the Orthodox standards of kashrut, the ordinance still fosters excess entanglement between city officials and leaders of the Orthodox faith with each and every prosecution." 66 F.3d at 1344. The same is

true here, where daily enforcement of the Challenged Laws requires state officials to determine the content of religious law. Moreover, under the Challenged Laws, a vendor who believes in good faith that its products are kosher under a standard other than the orthodox standard cannot avail itself of a good faith defense because, given the statutory meaning of kosher, as authoritatively established by the New York courts, that defense requires vendors to claim that they had a good faith belief that their products were kosher in accordance with orthodox Hebrew religious requirements.

The Challenged Laws thus are unlike the generally applicable mail fraud statute involved in *Ballard v. United States*, 329 U.S. 187 (1946), where criminal defendants were charged with using the mails to fraudulently promote a religious movement, and the Court upheld the withholding from the jury of any issue as to the truth or falsity of their religious beliefs but asked the jury to determine whether the defendants honestly and in good faith believed what they claimed to believe. Also instructive in this regard is *Jackson v. Mann*, 196 F.3d 316 (2d Cir. 1999), where the Court of Appeals for the Second Circuit reversed a grant of summary judgment to defendant prison officials, who had denied an inmate a kosher diet in reliance on the prison chaplain's conclusion that the inmate did not meet the chaplain's definition of a Jew as "one who was born Jewish or has formally converted." Rejecting an Establishment Clause claim on the ground that the issue was "more properly anchored in the Free Exercise Clause," the Court held that "whether Jackson's beliefs are entitled to Free Exercise protection turns on whether they are 'sincerely held,' not on the 'ecclesiastical question' whether he is in fact a Jew under Judaic law." 196 F.3d at 321.

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The Challenged Laws do not create excessive entanglement simply because they use a word of religious significance. *See Jones v. Butz*, 374 F. Supp. 1284, 1292-93 (S.D.N.Y. 1974), *aff'd*, 419 U.S. 806 (1974). *Jones* involved a challenge by animal rights activists who were concerned that exempting slaughter "in accordance with the ritual requirements of the Jewish faith or any other religious faith" from the Humane Slaughter Act, 7 U.S.C. §§ 1901 *et seq.* (1970), would lead to animal rights violations, and was a violation of the Establishment Clause. The district court held that the Act permissibly accommodated the free exercise of religion and did not involve excessive entanglement. In contrast, the Challenged Laws foster excessive entanglement and advance religion because they require the State to affirmatively assume ongoing obligations of enforcement of purely religious laws, inevitably requiring the State to rely on religious authority and interpretation to properly enforce them. Thus, *Jones* offers no basis for upholding the laws challenged here. *See Ran-Dav's*, 129 N.J. at 165; *Barghout*, 66 F.3d at 1343 (both distinguishing the kosher fraud law enforcement system from the constitutional religious exemption present in *Jones*).

Cases upholding the constitutionality of statutes such as Sunday closing laws are similarly inapposite. First, "the governmental functions involved [in those cases] have no connection with any religious practices." *Jones*, 374 F. Supp. at 1293.

We are not here confronted with legislation that is religious only in its historical origins but non-religious in its current applications. *E.g.*, *McGowan v. Maryland*, 366 U.S.

420 (1961) (stating that Sunday closing laws, although religious in origin, are applied without reference to religious purpose or principles); (other citations omitted). The kosher regulations rely expressly on religious tenets concerning what is kosher and who should be trusted to supervise kosher food preparation.

Ran-Dav's, 129 N.J. at 163-4; *Lemon*, 403 U.S. at 619; *see also Lynch*, 465 U.S. at 683 (in upholding the constitutionality of a city's creche display, the Court noted that "there is nothing here, of course, like the 'comprehensive, discriminating and continuing state surveillance' or the 'enduring entanglement' present in *Lemon*.")

Not only do the entanglements between the State and religion engendered by the Challenged Laws, in themselves, violate the First Amendment, but they also, by their nature, reflect an impermissible state advancement of religion. As stated in *Ran-Dav's*: "The Kosher regulations rely expressly on religious tenets concerning what is kosher and who should be trusted to supervise kosher food preparation. Because they work both as a constraint and as an inducement on merchants who must abide by them, and consumers who cannot avoid them, the primary, if not exclusive, effect of the regulatory process necessarily is to advance particular religious tenets." 129 N.J. at 164. In *Larkin v. Grendel's Den, Inc.*, *supra*, the Supreme Court struck down a Massachusetts zoning statute which permitted a church to veto the issuance of a liquor license to any establishment located within a 500-foot radius of the church. The Supreme Court found that the law in *Larkin* failed the *Lemon* test and violated the Establishment Clause because it both fostered excessive entanglement of

government with religion and had the effect of advancing religion. "Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government;" and "the mere appearance of a joint exercise of legislative authority by Church and State provides significant benefit to religion in the minds of some by reason of the power conferred." *Larkin*, 459 U.S. at 125-126.

In *Board of Ed. of Kiryas Joel Village School District v. Grumet*, the Supreme Court extended *Larkin* in holding that a state legislature not only may not expressly delegate governmental duties to a religious institution, but also may not otherwise "identif[y] . . . recipients of governmental authority by reference to doctrinal adherence." *Grumet*, 512 U.S. at 699. In *Grumet*, it struck down a New York statute which had created an independent school district known as the Village of Kiryas Joel, populated entirely by members of the Satmar Hasidic sect of Judaism. The Court found that, while the statute did not expressly delegate governmental authority based on religious criteria, it effectively did so, and thus was unconstitutional. *Id.* at 698-699. The Court held that "because both the district's public-school population and its school board would be exclusively Hasidic, the statute created a 'symbolic union of church and State' that was 'likely to be perceived by the Satmarer Hasidim as an endorsement of their religious choices, or by nonadherents as a disapproval' of their own. As a result, . . . the statute's primary effect was an impermissible advancement of religious belief." *Id.* at 695 (citations omitted).

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Relying particularly on *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997), the intervenors argue that changes in Establishment Clause jurisprudence since the decisions in *Ran-Dav's*, in 1993, and *Barghout*, in 1995, compel a result different from the result in those cases. In *Agostini*, the Supreme Court held constitutional a federally-funded program that sent public school teachers into parochial schools to provide secular remedial education to disadvantaged children. In doing so, the Court refined the "effect" prong of the *Lemon* test, as it applies to public aid to religious schools, and recognized that not all entanglements have the impermissible effect of advancing or inhibiting religion. *Agostini*, 521 U.S. at 232-33. *See also Mitchell v. Helms*, 530 U.S.793 (2000), plurality opinion at 2540-41 and concurring opinion at 2560. It noted that it had "abandoned the presumption erected in *Meek v. Pittenger*, 421 U.S. 349 (1975) and [*School District of the City of Grand Rapids v. Ball*, [473 U.S. 373 (1985)] that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion." *Agostini*, 521 U.S. at 223.

In contrast to *Agostini*, state officials in this case are charged with enforcing a set of religious laws. In *Doe v. Beaumont Independent School District*, 173 F.3d 274, 287-88 (5th Cir. 1999), the court found that neutrality in neither favoring nor disfavoring religion was the key factor supporting the constitutionality of the program in *Agostini*, and it held that volunteer counseling by clergy in public schools violated the Establishment Clause. The Fifth Circuit, in distinguishing *Doe* from *Agostini*, noted that "when the

government administers programs and distributes benefits according to neutral criteria which only incidentally benefit religious organizations, there is little danger that people will perceive any official endorsement of those organizations' beliefs. By contrast, there is a much greater danger that, when religious organizations and representatives participate in the affairs of government — at least when they do so not as an indistinguishable part of a larger effort, but rather in a manner clearly distinct and identifiable — such participation will create the clear impression that the government has reached out to such religious organizations and representatives precisely because of their religious affiliations." *Id.* at 288 n.59.

The same analysis applies here, where New York State has enacted laws specifically mandating what products may be called "kosher" and has incorporated "orthodox Hebrew religious requirements" into State law. In addition, the State has created the Kosher Law Advisory Board to "advise, counsel and confer" with the Commissioner of the Department of Agriculture and Markets "on matters of policy in connection with the administration and enforcement" of the laws relating to kosher food; to, "on its own initiative . . . recommend" changes to the laws to the Commissioner; and with the consent of the Commissioner, to submit for enactment by the legislature, drafts of legislation "imposing further restrictions" on the sale of kosher food products. N.Y. Agric. & Mkts. § 26-a(4).

The intervenors and defendant emphasize that New York's Challenged Laws do not place enforcement directly in the hands of religious authorities, nor require any government officials to have religious qualifications. But the

Supreme Court has recently reminded us that "context" is important in evaluating a facial challenge under the Establishment Clause. *Santa Fe*, 530 U.S. at 120. It is incontrovertible, given the context, that in order to consistently enforce the religious code adopted by the Challenged Laws, New York State is forced to rely on advisors chosen specifically because of their religious knowledge.[7] *See Ran-Dav's*, 129 N.J. at 156. As stated in *Barghout*, "[s]imply put, even if membership in the Bureau were not restricted to adherents of Orthodox Judaism or even if there were no Bureau at all, [the ordinance's] adoption of the Orthodox rules inevitably requires the intimate involvement of members of that faith, and the leaders of that faith, in discerning the applicable standard." *Barghout*, 66 F.3d at 1343-1344. And, "although the [State] has not expressly endorsed Orthodox Judaism or encouraged its practice by passing the ordinance, the incorporation of the Orthodox standard creates an impermissible symbolic union of church and state." *Id.* at 1345.

For the reasons stated above, and even taking *Agostini* beyond its school aid context, the entanglements involved here between religion and the State are not only excessive, in themselves, but they have the unconstitutional effect of endorsing and advancing religion. In sum, the Challenged Laws on their face violate the Establishment Clause of the United States Constitution. In light of this conclusion, the plaintiffs' other claims, under the federal and state constitutions, need not be addressed.

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7. The defendant Director of the Kosher Law Enforcement Division is a rabbi, and as of the filing of defendant's brief, New York's Kosher Law Advisory Board consisted of six rabbis, one government official, and two "professionals." Deft. Br. at 12.

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CONCLUSION

The Challenged Laws, N.Y. Agric. & Mkts. Law §§ 201-a, 201-b(1), 201-c, 201-e (2-a) and (3-c), 201-f, 201-h and 26-a, on their face violate the Establishment Clause and are therefore unconstitutional. Plaintiffs' motion for summary judgment is granted with respect to their claims regarding these Sections. Defendant's and intervenors' motions for summary judgment are denied. The Clerk of Court is directed to enter judgment declaring the Challenged Laws unconstitutional and permanently enjoining defendant from enforcing them.

SO ORDERED.

NINA GERSHON

United States District Judge

Dated: July 28, 2000

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS DENYING PETITION FOR REHEARING AND REHEARING EN BANC DATED AND FILED AUGUST 1, 2002

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 1st day of August two thousand two.

Dkt Nos: 00-9116(L), 00-9118(CON)

Commack Self-Service, et al.,

Plaintiffs-Appellees,

v.

Weiss,

Defendant-Appellant.

Appendix C

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Rabbi Luzer Weiss.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk

By: s/ Arthur M. Heller
Arthur M. Heller,
Administrative Attorney

APPENDIX D — STATUTES INVOLVED

The New York Agriculture and Markets Law

§ 201-a. Sale of kosher meat and meat preparations, kosher articles of food and food products

1. A person who, with intent to defraud, sells or exposes for sale any meat or meat preparations, article of food or food products, and falsely represents the same to be kosher or kosher for Passover, whether such meat or meat preparations, article of food or food products, be raw or prepared for human consumption, or as having been prepared under, and of a product or products sanctioned by, the orthodox Hebrew religious requirements, either by direct statement orally, or in writing, which might reasonably be calculated to deceive or lead a reasonable man to believe that a representation is being made that such food is kosher or prepared in accordance with the orthodox Hebrew religious requirements . . . is guilty of a class A misdemeanor. . . .

2. All fresh meats, meat by-products, meat food products and poultry offered for sale at retail as kosher shall be marked on the label when packaged or by a sign when not packaged, with the words "soaked and salted" or "not soaked and salted" as the case may be. Such words when marked on the label or by a sign shall be in letters at least as large as the letters of the words on the label or sign designating such meat, meat by-products, meat food products and poultry as kosher.

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3. Fresh meat, meat by-products, meat food products and poultry shall be defined as meat or poultry that has not been processed, except for salting and soaking.

. . . .

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§ 201-b. Sale of kosher meat and food in hotels and restaurants

1. A person who, with intent to defraud, sells or exposes for sale in any hotel, restaurant, or other place where food products are sold for consumption on or off the premises, any meat or meat preparations, article of food or food products, and falsely represents the same to be kosher or kosher for Passover, whether such meat or meat preparations, article of food or food products be raw or prepared for human consumption, or as having been prepared under, and of a product or products sanctioned by, the orthodox Hebrew religious requirements, either by direct statement orally, or in writing, which might reasonably be calculated to deceive or lead a reasonable man to believe that a representation is being made that such food is kosher or prepared in accordance with the orthodox Hebrew religious requirements, . . . is guilty of a misdemeanor. . . .

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§ 201-c. Fraudulent identification of food and food products

No person shall: 1. Wilfully mark, stamp, tag, brand, label or in any other way or by any other means of identification, represent or cause to be marked, stamped, tagged, branded, labeled or represented as kosher, or as kosher-style, or as having been prepared in accordance with the Hebrew orthodox religious requirements food or food products not kosher or not so prepared, or

2. Wilfully remove, deface, obliterate, cover, alter, or destroy or cause to be removed, defaced, obliterated, covered, altered or destroyed the original slaughter-house plumba or any other mark, stamp, tag, brand, label or any other means of identification affixed to foods or food products to indicate that such foods or food products are kosher or have been prepared in accordance with the Hebrew orthodox religious requirements, or

3. Knowingly sell, dispose of or have in his possession, for the purpose of resale to any person as kosher, any food or food products not having affixed thereto the original slaughter-house plumba or any other mark, stamp, tag, brand, label or other means of identification employed to indicate that such food or food products are kosher or have been prepared in accordance with the Hebrew orthodox religious requirements or any food or food products to which such plumba, mark, stamp, tag, brand, label or other means of identification has or have been fraudulently affixed.

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§ 201-e. Kosher and Kosher for Passover identification

. . .

2-a. In the event that non-prepackaged fresh meat or poultry is sold and delivered off-premises as Kosher the meat or poultry and the bill of sale, of any, rendered at the time of delivery shall have affixed to them a label or the printed words "not soaked and salted" or "soaked and salted" as the case may be.

. . .

3-c. Any person or firm owning or operating a slaughterhouse which produces meat or poultry which is offered as kosher in this state shall keep records with respect thereto, subject to inspection by the department, regarding the time, place, date, person or organization supervising the slaughter of the animal and the number of animals slaughtered in accordance with orthodox Hebrew religious requirements.

. . .

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§ 201-f. Kosher meat or poultry

1. All meat or poultry which is sold, offered or exposed for sale and is represented as having been prepared in accordance with orthodox Hebrew religious requirements and which has not been soaked and salted immediately after slaughter on the premises where slaughtered:

(a) shall have affixed to it a tag or plumba stating the date and time of day (a.m. or p.m.) of slaughter; and

(b) shall be washed in accordance with orthodox Hebrew religious requirements within seventy-two hours after slaughter, and within each subsequent seventy-two hour period, by a duly ordained orthodox rabbi or by a person authorized by him. The date and time of day (a.m. or p.m.) of each washing and the name of the person performing such duty shall be legibly indicated on the tag or plumba attached to the said meat or poultry.

2. No person shall sell, offer or expose for sale any meat or poultry which is represented as having been prepared in accordance with orthodox Hebrew religious requirements, unless such meat or poultry is in compliance with subdivision one of this section.

. . . .

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§ 201-h. Parve or pareve

It shall be unlawful to label food or food products with the words parve or pareve or in any way to indicate that the food or food product may be used or consumed indiscriminately with meat, poultry or dairy products according to Orthodox-Hebrew requirements when such food or food products are impermissible for such use or consumption.

§ 26-a. Advisory board on kosher law enforcement

1. There is hereby established in the department an advisory board on kosher law enforcement which shall consist of nine members, to be appointed by the commissioner of the department of agriculture and markets. Of the members first appointed, three shall be appointed for terms of one year, three for terms of two years and three for terms of three years. Their successors shall be appointed for terms of three years. The commissioner shall designate one of such appointees to be chairman of the advisory board. The advisory board may elect from its membership, a vice-chairman and a secretary. Vacancies in the membership of the advisory board occurring from any cause, shall be filled by the commissioner for the unexpired term.

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2. The commissioner may detail from time to time to the assistance of the advisory board such employees of the department as may be required, and shall provide suitable space in the offices of the department for the meetings and records of the advisory board.

3. The advisory board shall meet at the call of the commissioner and at such other times as it may deem necessary and at such places as may be convenient.

4. It shall be the duty of the advisory board hereby established to advise, counsel and confer with the commissioner on matters of policy in connection with the administration and enforcement of laws and rules relating to kosher meats, meat preparations, and food products, to consider all matters submitted to it by the commissioner, and on its own initiative to recommend to the commissioner such changes in the laws or rules relating to the possession, sale and exposure for sale of kosher meats, meat preparations, and food products, as may be deemed advisable to secure the effective administration and enforcement of such laws and rules and, with the consent of the commissioner, to submit for enactment by the legislature such draft or drafts of legislation imposing such further restrictions on the possession, sale and exposure for sale of kosher meats, meat preparations and food products, as may be deemed necessary.

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5. The advisory board shall adopt rules and regulations to govern its own proceedings. The secretary shall keep a complete record of all its proceedings which shall show the names of the members present at each meeting and any action taken by the advisory board. The record shall be filed in the office of the department. All records and other documents of the department relating to matters within the jurisdiction of the advisory board shall be subject to inspection by members of the advisory board.

6. The members of the advisory board shall receive no compensation for their services hereunder, but they shall be entitled to reimbursement for their actual and necessary traveling and other expenses heretofore or hereafter incurred by them in connection with the performance of their duties under this section.

Supreme Court, U.S.
FILED
JAN 24 2003
OFFICE OF THE CLERK

No. 02-672

In The Supreme Court of the United States

RABBI LUZER WEISS,

Petitioner,

v.

COMMACK SELF-SERVICE KOSHER MEATS, INC. d/b/a COMMACK KOSHER, BRIAN YARMEISCH, JEFFREY YARMEISCH, HON. SHELDON SILVER, ABE ALPER, JON GREENFIELD, JACK LEE, RABBI MOSHE PORTNOY, RICHARD SCHWARTZ, AGUDATH HARABONIM OF THE UNITED STATES AND CANADA, AGUDATH ISRAEL OF AMERICA, NATIONAL COUNCIL OF YOUNG ISRAEL, RABBINICAL ALLIANCE OF AMERICA, RABBINICAL COUNCIL OF AMERICA, TORAH UMESORAH-NATIONAL SOCIETY OF HEBREW DAY SCHOOLS and UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Respondent Commack Self-Service Kosher Meats, Inc. d/b/a Commack Kosher, has no parent or subsidiary corporations and no public corporation holds any of said Respondents' stock.

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents Commack Self-Service Kosher Meats, Inc., d/b/a Commack Kosher, Brian Yarmeisch and Jeffrey Yarmeisch, by their counsel Robert Jay Dinerstein, Esq., hereby respectfully respond to the petition of Rabbi Luzer Weiss, as Director of the Kosher Enforcement Bureau of the Department of Agriculture & Markets of the State of New York (the "State"), to review the decision of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The State brings on this Petition for a Writ of Certiorari in an attempt to reverse the opinion of the United States Court of Appeals for the Second Circuit, reported at 294 F.3d 415 (2d Cir. 2002), a copy of which is set forth in Appendix A to the State's Petition; an opinion which affirms the decision of the United States District Court for the Eastern District of New York. *Commack Self-Service Meats v. Rubin*, 106 F.Supp. 2d 445, a copy of which is set forth at Appendix B to the State's Petition.

COUNTER STATEMENT OF THE CASE

The underpinning of this case is the unconstitutionality of §201-a, §201-b, §201-c, §201-e, §201-f, §201-h and §26-a of the New York State Agriculture & Markets Law [hereinafter the "Statute"]. The Statute purports to prevent or punish fraud in the sale of *kosher* food products.

While over the years the term *kosher* has been incorporated into the vernacular, *kosher*, in the context of the Statute, speaks the dogma of Judaism. The Petitioner and the Petitioners in the companion Petition[1] have conceded that, even within the orthodox Jewish community, there is no unanimity in the interpretation of the Jewish laws governing what is *kosher*. The result is that "to assert that a food article does not conform to kosher requirements, New York must take an official position as to what are the *kosher* requirements. In doing so, the Department [State] must either interpret religious doctrine or defer to the interpretations of religious officials in reaching its official position." *Commack Self-Service Kosher Meats, Inc. v. Weiss,* 294 F.3d 415, 427 (2d Cir. 2002)

The Respondents concur with, and adopt, the findings of the Courts below both as to the facts and the legal analysis and incorporate same herein by reference. It is also of consequence that it is undenied that the Jewish laws, which the Statue attempts to regulate, are found in the *Torah,* the first five books of the Jewish scriptures, and in the *Schulchan Aruch*, the Code of Jewish Law. The unconstitutionality of the Statute is underscored by the

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[1] Sheldon Silver, Abe Alper, Jon Greenfield, Jack Lee, Rabbi Moshe Portnoy, Richard Schwartz, Agudath Harabonim of the United States and Canada, Agudath Israel of America, National Council of Young Israel, Rabbinical Alliance of America, Rabbinical Council of America, Torah Umesorah-National Society of Hebrew Day Schools and Union of Orthodox Jewish Congregations of America, *Petitioners*, v. Commack Self-Service Kosher Meats, Inc. d/b/a Commack Kosher, Brian Yarmeisch, and Jeffrey Yarmeisch, *Plaintiffs-Respondents*, and Rabbi Luzer Weiss, as Director of the Kosher Law Enforcement Division of the New York State Department of Agriculture and Markets, *Defendants-Respondents*.

fact that the *Torah* and the *Schulchan Aruch* are written in Hebrew and Aramaic. While the *Torah* has been translated into English,[2] the *Yoreah Deah*, the relevant portion of the *Schulchan Aruch* dealing with the laws of what is *kosher*, has not been translated into English. There are commentaries on the *Yoreah Deah* in English, however, as a predicate to enforcing the Statute the State would have to determine which commentary was sufficiently authoritative to justify the State's reliance thereon. Of course, such approach ignores the fundamental truth that the *Yoreah Deah* contains lengthy debates by Rabbis who try to interpret the laws and who are not always in agreement. Since, in the Jewish religion, there is no one equivalent to the Pope, *Pirkei Avot*, a compendium by Jewish sages of *Talmudic* legal rulings and *Halachic* axioms relating to the Jewish view on the sanctity of life and the ethical and moral principles guiding the Jewish way of life, mandates that one "get yourself a Rabbi." In Judaism it is the Rabbi an individual selects who is the final authority for that person with respect to matters of Jewish law and practice. In support of such concept, Jewish law mandates that once a question has been posed about Jewish observance to a Rabbi and the Rabbi has rendered a decision, the question cannot be posed to another Rabbi. No Rabbi outranks another and, therefore, the observance of Judaism varies from Rabbi to Rabbi and community to community.

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[2] It should be noted that there are differences in the translation between various publications representing themselves to be English translations of the *Torah*. The orthodox Jews, as a rule, rely on the original Hebrew and refer to their Rabbis as to any ambiguity.

Just as the Protestant faith is comprised of many denominations, running the gamut from the Evangelical and Pentecostal sects to the Unitarian Universalist churches, in Judaism there are, *inter alia*, Hasidic sects, Orthodox Jews, Modern Orthodox Jews, Union for Traditional Judaism, Conservative Jews, Reform Jews and Reconstructionist Jews. It was undenied in the proceedings below that the orthodox Jewish community has publicly proclaimed that non-orthodox denominations of Judaism are not legitimate sects of Judaism. The State of New York has been deferential to orthodox Judaism by attempting to enforce the Statute without regard to the fact that, in addition to the lack of unanimity of opinion, even amongst orthodox Jews, as to the Jewish *kosher* laws, non-orthodox denominations of Judaism have a different perspective on the Jewish *kosher* laws.

As the Second Circuit found:

> [T]here is considerable disagreement over what precepts or tenets truly represent the laws of kashrut. There are differences of opinion concerning the application and interpretation of the laws of kashrut both within Orthodox Judaism and between Orthodox Judaism and other branches of Judaism. *Ran-Dav's County Kosher v. New Jersey,* 129 N.J. 141, 147, 608 A.2d 1353 (1992) (citing Herman Wouk, *This Is My God* (1959), reprinted in *The Life of Torah* 98-99 (Jacob Neusner ed. 1974); Rabbi Hayim Halevy Donin, *To Be a Jew* 102-04, 112-19 (1972); Rabbi J. David Bleich, *Contemporary Halakic Problems* 84-92 (1977)). For example, Orthodox Jews of the Sephardic sect adhere to "glatt" kosher standards that are more stringent than those followed by other Orthodox Jews. Raphael Poliakoff, *What Is Glatt Kosher?*, Kashrus Newsletter, vol. 1, no. 5.

> As between different branches of Judaism, "Conservative and Orthodox rabbis differ sharply on many . . . issues" such as the kosher status of wine, cheese, sturgeon, and swordfish. Mark A. Berman, *Kosher Fraud Statutes and the Establishment Clause: Are They Kosher?*, 26 Col. J.L. & Soc. Probls. 1, 8 (1992). It is also widely recognized that "the strain between all three denominations [Orthodox, Conservative, and Reform] has increased in recent years." *Id.*
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> We find it indisputable that there are differences of opinion within Judaism regarding the dietary requirements of *kashrut*. As a result, because the challenged laws interpret "kosher" as synonymous with the views of one branch, those of Orthodox Judaism, the State has effectively aligned itself with one side of an internal debate within Judaism. *Commack*, 294 F.3d 415.

The State's adoption of "orthodox Hebrew religious requirements" as the criteria is analogous to the State of New York declaring that, since Catholicism was the first denomination of Christianity, if another denomination of Christianity offered its members Communion, they could only use a Eucharist and wine approved by the Roman Catholic Church; otherwise, the Communion was illegitimate and perpetrated a fraud. Similarly, are the Orthodox Christian sects (Russian, Armenian, Greek, etc.) perpetrating a fraud on their adherents because they do not celebrate Christmas and Easter when Catholicism and the other Christian faiths observe same.

The unavoidable conclusion is that in the State's attempt to regulate what is or is not *kosher*, "the State has effectively aligned itself with one side of an internal

debate with Judaism," *Id.* 426 and excessively entangled the State in religion.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT PRESENT A CONFLICT

The decision of the United States Court of Appeals for the Second Circuit finding the challenged statute to be unconstitutional is correct and does not conflict with the decision of any Federal Court of Appeals or with any decision of this Court.

This Court denied a Petition for Certiorari in the matter of *Ran-Dav's County Kosher, Inc. v. New Jersey*, 507 U.S. 952 (1993), which, *inter alia*, raised the essentially identical issue.

Petitioner's reliance upon this Court's decision in *Hygrade Provision Co. v. Sherman,* 266 U.S. 497 (1925) to argue that a conflict exists is misplaced. The Petitioner neglects to acknowledge that the *Hygrade* case involved the Due Process Clause rather than the Establishment Clause. As the Petitioner should have recognized, it was not until some twenty (20) years after the Court rendered the *Hygrade* decision that the Fourteenth Amendment was held applicable to the states. *See Everson v. Board of Education,* 330 U.S. 1, 15, 16 (1947).

> Like the Establishment Clause generally, the prohibition on excessive government entanglement with religion "rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *Illinois ex*

> *rel. McCollum v. Bd. Of Educ.*, 333 U.S. 203, 212, 68 S.Ct. 461, 92 L.Ed. 649 (1948).
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> It appears to us that the challenged laws excessively entangle government and religion because they (1) take sides in a religious matter, effectively discriminating in favor of the orthodox Hebrew view of dietary requirements; (2) require the State to take an official position on religious doctrine; and (3) create an impermissible fusion of governmental and religious functions by delegating civic authority to individuals apparently chosen according to religious criteria.
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> The Department argues that the challenged laws do not excessively entangle the government with religion because "no one disputes the meaning of the term 'kosher.'" There is ample evidence in the record to support the opposite conclusion. *Commack*, 294 F.3d 426-428

Furthermore, in *Hygrade* this Court qualified its finding by stating that the meaning of *kosher* was well enough defined "at least as a general thing." In the over eight decades which have elapsed since the *Hygrade* decision was rendered, the world has changed. Sixty or seventy years ago when someone spoke of "grass" there was no confusion – the reference was to the plant that grew on lawns and on which cattle and other animals fed. Today, "grass" is widely recognized as synonymous with "marijuana." Similarly, in the not so distant past the word "gay" described a cheerful, lighthearted excitement or, especially in matters of color, bright or lively. Currently, it is synonymous with a sexual orientation.

The irony is that the Petitioner's fundamental premise is fatally flawed. Throughout the State of New York products are freely sold as *kosher* which bear the symbol

"k" or which bear the trade style of *kosher* supervisory agencies which the orthodox Jewish community finds to be of questionable reliability.[3] While the products may be sufficiently *kosher* for non-orthodox denominations of Judaism, a product which is merely *kosher* is not adequately *kosher* for many, if not most, orthodox Jews.

The term *kosher,* like "grass" and "gay" and innumerable other words, has also gone through a metamorphosis. The post-World War II influx of Jewish immigrants resulted in the introduction to the United States of customs and traditions in the observance of the *kosher* laws which the immigrants had observed in their homelands. It created even greater diversity in the meaning of what was *kosher*. As the record before the Second Circuit conclusively demonstrated, today something which is merely *kosher* is unacceptable to many, if not most, of the orthodox Jewish community. Today the majority of the orthodox Jewish community only finds meat and poultry that is *glatt kosher*, *kosher LeMahadrin* or supervised by a limited number of supervising agencies to be acceptable.

In the final analysis the State, in bringing on this petition, is challenging the legitimacy of non-orthodox denominations of Judaism and, the State's rhetoric notwithstanding, would deny non-orthodox Jewish purveyors from selling fresh meat and poultry, groceries and prepared foods as *kosher* despite the fact that duly ordained Rabbis find same to be acceptably "*kosher.*" The State is

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[3] The members of the orthodox Jewish community will generally rely on their Rabbis to identify the supervisory organizations which their Rabbi deems to be acceptable.

prepared to deny non-orthodox denominations of Judaism the inalienable right to practice their bona fide religion merely because the orthodox Jewish community disagrees with the tenets of the non-orthodox denominations.

II. THE PETITIONER OFFERS NO REASON FOR THIS COURT TO RECONSIDER ITS ESTABLISHMENT CLAUSE JURISDICTION

At issue in this case is New York State's enactment and enforcement of the Statute which requires the State's intervention into an ancient and continual doctrinal debate over Judaism's *kosher* laws. This case does not involve the complex issues of neutral, non-sectarian, state accommodation of all religious beliefs and, therefore, whatever disagreement there might be amongst the members of the Court with respect to the *Lemon* test, *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Establishment Clause principles necessary to resolve these issues are not in flux.

This Court has unambiguously declared that secular Courts may not evaluate the conformity of a church's members to the tenets of the faith, may not substitute their judgment for that of religious entities, may not take jurisdiction over religious disputes between the church and its clergy or its members, and must accept as binding the decisions of ecclesiastical bodies with respect to issues of church discipline or governance. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713-18 (1976)

When the "fundamental question of who will preach from the pulpit of a church, and who will occupy the church parsonage" is at issue, "[t]he bare statement of the

question should make obvious the lack of jurisdiction of a civil court. The answer to that question must come from the church." *Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 492 (5th Cir. 1974).

While the case at bar does not involve who will preach from the pulpit, it does involve the legitimacy of non-orthodox denominations of Judaism. If a duly ordained, albeit non-orthodox, Rabbi determines that something is *kosher* in accordance with the tenets of the Rabbi's denomination of Judaism, neither the State nor any Court should be empowered to challenge that Rabbi's decision.

Laws that "grant[] a denominational preference," such as the *kosher* regulations at issue here, are subject to "strict scrutiny" even when the state's interest is the important one of protecting citizens from fraud. *Larson v. Valente,* 456 U.S. 228, 246-47 (1982). Attempts by the State to enforce a commercial code that is predicated upon orthodox Hebrew religious requirements raise a "substantial danger that the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs." *Serbian Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 709 (1976). *See also Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 448 (1969).

The State's enforcement of the Statute "enmesh[es]" religious leaders "in the exercise of substantial government powers contrary to this Court's consistent interpretation of the Establishment Clause; 'the objective is to prevent, as far as possible, the intrusion of either Church or State into the precincts of the other.'" *Larkin v. Grendel's Den*, 459 U.S. 116, 126 (1982). Although "[s]ome limited and incidental entanglement between church and

state is inevitable in a complex modern society," *id.* at 126, such "direct cooperation between state officials and religious ministers" is flatly forbidden by the First Amendment, *McGowan v. Maryland*, 366 U.S. 420, 452 (1961), which prohibits a State from employing religious authorities as an adjunct of the civil law enforcement regime "to perform the function of interpreting and applying state standards." *Presbyterian Church*, 393 U.S. at 451. The constitutional vice is compounded by the fact that New York's courts, in the course of enforcing the regulations and deciding which religious authority's understanding of *kashrut* is truly orthodox, would inevitably become embroiled in deciding ecclesiastical questions that are wholly inappropriate for resolution by civil authorities. *See, e.g., Presbyterian Church,* 393 U.S. at 440; *Serbian Orthodox*, 426 U.S. at 709.

The *kosher* regulations are also beyond the constitutional pale because the intermingling of state power and religious doctrine created "the danger of political fragmentation and divisiveness on religious lines." *Grendel's Den*, 459 U.S. at 127.

The Second Circuit found that:

> "to assert that a food article does not conform to kosher requirements, New York must take an official position as to what are the kosher requirements. In doing so, the [State] must either interpret religious doctrine or defer to the interpretations of religious officials in reaching its official position." *Commack Self-Service Kosher Meats, Inc. v. Rabbi Luzer Weiss*, 294 F.3d 415, 427.

The Second Circuit also found the Petitioner's contention that there was a complete absence of Kosher Advisory

Board[4] involvement in enforcement activities to be less than wholly accurate. *Commack*, 294 F.3d 429.

Judge Miner, writing for the Circuit Court, put it as follows:

> Although members of the Board do not directly participate in enforcement activities such as the actual inspection of kosher food establishments, issuance of citations, or pursuit of court action against alleged violators, we decline to take such a narrow view of the Board's involvement with enforcement of the challenged laws. To conclude otherwise, would be to exalt form over substance in light of the broad powers granted to the Board that substantially affect enforcement of he challenged laws.
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> [*3*] While we acknowledge that "some limited and incidental entanglement between church and state authority is inevitable in a complex modern society," *Larkin*, 459 U.S. at 123, 103 S.Ct. 505, "[w]here 'fusion' [of governmental and religious authority] is an issue, the difference lies in the distinction between a government's purposeful delegation on the basis of religion and a delegation on principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority." [*Board of Ed. Of Kiryas Joel v. Grumet*, 512 U.S. [687] at 699, 114 S.Ct. 2481. In our case, the Board's purpose – to advise the Department regarding the requirements of Orthodox Jewish dietary laws – and the fact that, of the six Rabbis on the Board,

[4] New York State Agriculture and Markets Law §26-a

> all are Orthodox, convince us that New York's delegation of authority to the Board was made on the basis of religion and not "on principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority." *Id.* at 699, 114 S.Ct. 2481.
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> We find it insignificant that *section 26-a* does not require that Board members be Rabbis or even Orthodox Jews. Instead, we agree with the Fourth Circuit that even if membership [o]n the [Advisory Board] were not restricted to adherents of Orthodox Judaism, or even if there were no [Advisory Board] at all, [the laws'] adoption of the Orthodox rules inevitably requires the intimate involvement of members of that faith, and the leaders of that faith, in discerning the applicable standard. *Barghout v. Bureau of Kosher Meat & Food Control,* 66 F.3d 1337, 1343-44 (4th Cir. 1995); *Commack,* 294 F.3d 429.

It is also disingenuous for the State to argue that the Second Circuit relied on one example of enforcement to conclude that the challenged statues [the Statute] necessarily require the State to interpret religious doctrine. The State is well aware that the record below cites numerous violations of the Respondents' constitutional rights by the State. At his deposition the then serving Director of the Kosher Enforcement Division insisted that certain lamb tongues were unkosher despite his admission that he was aware that the Respondents' supervising Rabbi had ruled that the tongues in issue were acceptably *kosher*.[5] That

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[5] The Yarmeisches' demand for a bill of particulars [in the lamb tongue case] merely made more obvious a fact that would have been true even without the demand for a bill of particulars. The State

(Continued on following page)

was one of many instances which belie the State's contention that intent is a predicate to the finding of a violation.

The Respondents are not the only victim of the State's violation of their religious freedom as the Petitioner would have this Court believe. In *National Foods, Inc. v. Rubin*, 727 F.Supp. 104, 109, the District Court observed that "Hebrew National seems to argue that since it engages Rabbis to supervise all of its meat processing and since on June 19, 1985 a supervising Rabbi certified that its meat was *kosher*, that certification is conclusive evidence of compliance with the statute."

Another case in point involves Brach's, a *kosher* market operated under orthodox Jewish supervision. Brach's was cited for selling unkosher tongues; the State claimed that Brach's had failed to devein the tongues as required. Since Brach's orthodox supervision found the tongues in issue to be *kosher*, Brach's argued that it was undeniable that in finding a violation of the Statute the State was interpreting Jewish rabbinical law in violation

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authorities could not make a determination that the Yarmeisches' meat did not conform to *kosher* requirements without first having arrived at an official position on what the *kosher* requirements are. To do so excessively entangles the State with religion. *See Presbyterian Church*, 393 U.S. at 451-52, 89 S.Ct. 601. We also find that the challenged laws fail the excessive entanglement inquiry because they run afoul of "the core rationale underlying the Establishment Clause[, which] is preventing 'a fusion of governmental and religious functions.'" *Larkin*, 459 U.S. at 126, 103 S.Ct. 505 (quoting *School District of Abington Township v. Schempp*, 374 U.S. 203, 222, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963)). This prohibition is violated not only by the requirement that the State adopt an official position on a matter of religious doctrine, but also by the existence and activities of the Advisory Board. *Commack*, 294 F.3d 415.

of the Establishment Clause. The State did not hesitate to pit its interpretation of Jewish dogma against that of Brach's duly ordained supervising orthodox Rabbi, *Brach's Meat Market v. Abrams*, 668 F.Supp. 275, 278 (S.D.N.Y. 1987).[6]

The result is that there is extensive entanglement to a primarily religious effect and there are no circumstances under which the Statute could pass constitutional scrutiny.

III. THE CIRCUIT COURT'S DECISION CONFORMS WITH THIS COURT'S PRECEDENTS FOR ADJUDICATION OF FACIAL CHALLENGES AND FINDS A GOVERNMENT ENDORSEMENT OF RELIGION IN VIOLATION OF THE ESTABLISHMENT CLAUSE

The Petitioner argues at length that the Second Circuit's decision conflicts with the Court's precedent governing facial challenges.

The Court below unambiguously articulated its basis for rejecting the Petitioner's argument:

> As the Supreme Court has recently reiterated, in "cases involving facial challenges on Establishment Clause grounds, . . . we assess the constitutionality of an enactment by reference to the three factors first articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)." *Santa Fe Ind.*

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[6] In fact, the District Court found that the question of whether *kosher* meat must be deveined apparently remains an open issue in the Jewish religion. *Id.* 278 FN 4.

Sch. Dist. v. Doe, 530 U.S. 290, 314 (2000) (internal quotation marks and citations omitted). The *Lemon* factors require that a challenged law (1) have a valid secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not foster excessive state entanglement with religion. 403 U.S. at 612-13. We treat the excessive entanglement prong as a part of our "inquiry into a statute's effect." *Agostini v. Felton*, 521 U.S. 203, 233 (1997). We find the challenged laws do not pass constitutional muster under the *Lemon* test because they have a primary effect that both advances and inhibits religion.[7] *Commack*, 294 F.3d, 425

FN7: Plaintiffs contend we should judge the constitutionality of these laws under the standard of strict scrutiny, as in *Larson v. Valente*, 456 U.S. 228, 246 (1982), and defendants claim that, because this is a facial attack, we should apply the rule of *United States v. Salerno*, 481 U.S. 739, 745 (1987), requiring the Plaintiff to show that "no set of circumstances exists under which the (statute) would be valid." We need not answer either question because we conclude for the reasons given that, as to both questions, the laws fail the test of constitutionality even using the assumptions that are most accommodating to the State.

Petitioner attempts to bolster its specious position by arguing that in matters of ***kashruth*** [the practice of being kosher] all Jews start with the "orthodox Hebrew religious requirement" as their common point of reference. In the

footnote, n.6, the State represents that "Had those provisions required the State to favor orthodox Judaism over Conservative Judaism, the United Synagogue of America presumably would have opposed the legislation. While the Respondents do not know the circumstances surrounding the enactment of the Statute, apparently the Petitioner has forgotten that the United Synagogue of Conservative Judaism, the parent body for Conservative Jewish congregations, joined in an *amicus* brief to the Second Circuit in support of Respondents.

IV. THE CHALLENGED STATUTE CONSTITUTES A GOVERNMENT ENDORSEMENT OF RELIGION IN VIOLATION OF THE ESTABLISHMENT CLAUSE

It defies credibility that the Petitioner criticizes the Second Circuit for failing to adopt the "reasonable observer's" viewpoint as to whether or not the challenged statute favors orthodox Judaism over other denominations of Judaism. It is undenied that virtually each of the intervening organizations has publicly declared that non-orthodox denominations of Judaism are illegitimate and/or unauthentic. It appears to be that, consistent with the position of the Intervenors and their fellow members of the orthodox Jewish community, an acknowledged powerful voting block, the State has historically taken the position that, in the context of the challenged statute, *kosher* is synonymous with "orthodox Hebrew religious requirements."

Judge Gershon found that, as the Respondents contend, the settled interpretation of the challenged statute is that "*kosher*" means "in accordance with orthodox Hebrew religious requirements"; a conclusion she finds confirmed

by the brief of Robert Abrams, as Attorney General of the State of New York, in *Ran-Dav's County Kosher, Inc. v. State*, 129 N.J. 141, 608 A.2d 1353 (1992), *cert. denied*, 507 U.S. 952 (1993); *Commack*, 106 F.Supp. 2d 4, 450. The numerous judicial decisions holding that the Statute defines "*kosher*" as synonymous with "orthodox Hebrew religious requirements," collaterally estop the State from now arguing otherwise.

To enforce the Statute enmesh[es] religious leaders in the exercise of substantial government powers contrary to this court's consistent interpretation of the Establishment Clause; "the objective is to prevent, as far as possible, the intrusion of either Church or State into the precincts of the other." *Larkin v. Grendel's Den*, 459 U.S. 116, 126 (1982). "Some limited and incidental entanglement between church and state is inevitable in a complex modern society." *Id.* at 23. The Statute's adoption of orthodox Hebrew religious requirements as the criteria is neither "limited" nor "incidental," "'fusion of governmental and religious functions'" in the area of religious dietary doctrine. *Id.* at 126. Such "direct cooperation between state officials and religious ministers" is flatly forbidden by the First Amendment, *McGowan v. Maryland*, 366 U.S. 420, 452 (1961), which prohibits a State from employing religious authorities as an adjunct of the civil law enforcement regime "to perform the function of interpreting and applying state standards." *Presbyterian Church*, 393 U.S. at 451. The constitutional vice is compounded by the fact that the State, to enforce the regulations, must decide which religious authority's interpretation of Judaism's dietary laws is truly orthodox. In doing so the State must inevitably become embroiled in deciding ecclesiastical questions that are wholly inappropriate for resolution by

civil authorities. *See, e.g., Presbyterian Church*, 393 U.S. at 440; *Serbian Orthodox*, 426 U.S. at 709.

The *kosher* regulations are also violative of the Establishment Clause because the intermingling of state power and religious doctrine creates "the danger of political fragmentation and divisiveness on religious lines." *Grendel's Den*, 459 U.S. at 127. The record in this case conclusively establishes that the State's enforcement of the Statute provoked precisely the sort of turmoil identified by this Court in *Grendel's Den*. In that case, where the Court struck down a law delegating a role in liquor licensing to local churches, this Court noted the risk that this power could be "employed for specifically religious goals, for example, favoring liquor licenses for members of that congregation or adherents of that faith." 459 U.S. at 125. In New York, the abuse was manifested by the State's targeting of purveyors of *kosher* food which was not under orthodox Jewish supervision.

In *Lee v. Weisman*, 112 S.Ct. 2649 (1992), this Court reasserted the proposition that the state must not insinuate itself into sectarian "religious debate," because "[a] state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." *Id.* at 2657, 2658 (Kennedy, J., for the Court). "Government may neither promote nor affiliate itself with any religious doctrine or organization, nor may it obtrude itself in the internal affairs of any religious institution." *Id.* at 2661-62 (Blackman, J., joined by Stevens and O'Connor, JJ., concurring). This reflects the "Madisonian concern that secular and religious authorities must not interfere with each other's respective spheres of choice and influence." *Id.* at 2663 n.3 (Blackmun, J., joined by Stevens and O'Connor, JJ.,

concurring). By allowing the state courts to arbitrate between competing understandings of just what is *kosher* under Jewish law, the State "invite[s] the courts to engage in comparative theology. I can hardly imagine a subject less amenable to the competence of the . . . judiciary, or more deliberately to be avoided where possible." *Id.* at 2671 (Souter, J., joined by Stevens and O'Connor, JJ., concurring).

In *Weisman* even the dissenters agreed that the Establishment Clause "ruled out of order government-sponsored endorsement of religion – even when no legal coercion is present . . . – where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world, are known to differ." *Id.* at 2683-84 (Scalia, J., joined by Rehnquist, C.J., and White and Thomas, JJ., dissenting). The state may not "lend its power to one or the other side in controversies over religious authority or dogma." *Employment Division, Dept. of Human Resources v. Smith*, 494 U.S. 872, 877 (1990) (Scalia, J., for the Court). That is precisely what the State has done and now tries to justify.

Thus, the nuances of the *Lemon* test and the controversy surrounding them are simply not implicated by the decision below. The outcome was dictated by Establishment Clause principles – on which this Court is unanimous – that forbid state involvement in sectarian religious debates and the use of coercive state power to promote religious doctrine. The decision below presents no occasion to choose between the *Lemon* test and any alternative "coercion" theory of the Establishment Clause.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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